

No. 12548

United States
Court of Appeals
For the Ninth Circuit.

See vol 2843

WOODWORKERS TOOL WORKS, a Corpora-
tion,

Appellant,

vs.

WILLIAM J. BYRNE,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED
AUG 13 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

TRIPP & CALLAWAY,
F. V. LOPARDO,
210 West 7th St.,
Los Angeles 14, Calif.

For Appellee:

JOHN W. OLSON,
639 S. Spring St.,
Los Angeles 14, Calif.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 9134-Y

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a Corpora-
tion,

Defendant.

AMENDED
COMPLAINT FOR PERSONAL INJURIES

Comes Now the plaintiff and complains of de-
fendant above-named and for cause of action al-
leges as follows:

I.

That at all times hereinafter referred to, plaintiff
was and is a resident of the County of Los Angeles,
State of California, and a citizen of the State of
California.

II.

That defendant is and was at all times herein-
after mentioned a corporation, duly organized and
existing by virtue of the laws of the State of Illi-
nois, engaged in manufacturing machine tools, and
in the business of selling machine tools in the State
of California.

III.

That plaintiff is a citizen of the State of Califor-
nia and defendant is a corporation incorporated

under the laws of the State of Illinois. The matter in controversy exceeds, exclusive [3*] of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

IV.

That at all times hereinafter mentioned, plaintiff was regularly employed by E. George Selby, doing business as Selby Company, in the County of Los Angeles, State of California.

V.

That on or about the 23rd day of October, 1948, plaintiff's employer purchased from defendant a new Champion panel raiser head, 1¼ bore, right hand, hereinafter referred to as "panel head," designed, manufactured and sold by said defendant for cutting lumber. That said panel head was installed for use in cutting lumber at the place of business of plaintiff's employer on or about the 26th day of October, 1948, and plaintiff was employed to cut lumber with the same.

VI.

That on the 28th day of October, 1948, as approximately 8:45 a.m. of said day, plaintiff, in the regular course of his employment, was engaged in cutting lumber with said panel head. That at said time and place, said panel head, revolving at hundreds of revolutions per mintue, suddenly broke from structural defects, a piece of which struck plaintiff, directly and proximately causing the injuries and damages to plaintiff hereinafter described.

* Page numbering appearing at bottom of page of original certified Transcript of Record.

VII.

That defendant sold the said panel head to plaintiff's employer for the express purpose of its being used and operated as plaintiff was operating it when injured as aforesaid. That defendant warranted the structural safety of said panel head against breaking and injuring plaintiff.

VIII.

That until plaintiff William J. Byrne was injured as [4] aforesaid, he was a strong, active and healthy man in body and mind.

IX.

That the force and impact of the piece of said panel head as it struck the plaintiff was such as to inflict serious and permanent injuries to plaintiff; that plaintiff suffered severe lacerations of his right hand; that plaintiff has suffered and is still suffering great physical pain and mental stress from said injuries; that at the time of said injury plaintiff was thirty-three (33) years old; that he was earning and capable of earning from Two Hundred and Sixty (\$260.00) Dollars to Two Hundred and Seventy-Five (\$275.00) Dollars per month; that due to said injury plaintiff has been and will be totally disabled from pursuing his usual occupation as a mill worker and will be permanently partially disabled from performing any labor as a mill worker or any work depending upon the full use of his right hand; that ever since the said accident, plaintiff has been under the care of physicians for said injuries and

has incurred medical expenses in the sum of Two Hundred and Fifty (\$250.00) Dollars; that further medical expenses are being incurred by plaintiff as a result of said personal injuries, and plaintiff asks leave of the Court to amend this complaint when the full amount of such medical expenses is ascertainable.

X.

That plaintiff has thus been damaged by the negligence and carelessness of defendant in selling and delivering to plaintiff's employer said structurally defective panel head, and defendant's breach of warranty as to its safety, in the sum of Thirty Thousand (\$30,000.00) Dollars.

Wherefore plaintiff prays judgment against defendant as follows:

1. For the sum of \$30,000.00 as damages. [5]
2. For medical expenses when the total has been ascertained.
3. For costs of suit herein incurred.
4. For such other and further relief as is just and proper.

/s/ JOHN W. OLSON,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed Jan. 26, 1949. [6]

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to serve upon John W. Olson plaintiff's attorney, whose address is 639 South Spring Street, Los Angeles 14, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: January 26, 1949.

EDMUND L. SMITH,
Clerk of Court.

[Seal] By /s/ G. A. SAUNDERS,
Deputy Clerk.

Return of service of Writ attached.

[Endorsed]: Filed February 2, 1949. [8]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ACTION
AND QUASH THE RETURN OF SERVICE
OF SUMMONS

The defendant, Woodworkers Tool Works, a corporation, moves the court as follows:

To dismiss the action, or in lieu thereof, to quash the return of service of summons on the grounds:

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Illinois and was not and is not subject to service of process within the Southern District of California.

2. That the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of E. H. Preuer and Robert E. Dunne hereto annexed as Exhibits "A" and "B" respectively. [10]

Notice of Motion

Please take notice, that the undersigned will bring the above motion on for hearing before this Court as Room 5, United States Courts and Post Office Building, County of Los Angeles, City of Los Angeles, on the 14th day of March, 1949, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: February 24, 1949.

TRIPP & CALLAWAY,

By /s/ ROBERT E. DUNNE,

Attorneys for Defendant. [11]

Points and Authorities

1. The following defenses may be made by motion: (a) lack of jurisdiction over the person; (b)

insufficiency of process; (c) insufficiency of service of process:

Rule 12b, Fed. Rules of Civil Proc.

Mas v. Owens-Illinois Glass Co., 34 Fed. Supp. 415.

Cannon v. Time, Inc., et al., 115 Fed. (2d) 423.

Hedrick v. Canadian Pacific Railway Co., 28 Fed. Supp. 257.

2. Service of summons and complaint upon a foreign corporation must be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process; or service must be made in the manner prescribed by a statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Rule 4d (3) (7) of the Fed. Rules of Civil Proc.

Mas v. Owens-Illinois Glass Co., Supra;

Cannon v. Time, Inc., et al., Supra;

Hedrick v. Canadian Pacific Railway Co., Supra.

3. Where defendant is a foreign corporation, validity of service depends on whether the corporation was doing business in such manner and to such

extent as to warrant inference that, through its agents, it was present in the district.

Hincheliffe Motors Inc. v. Willys-Overland
Motors Inc. 30 Fed. Supp. 580; [12]
Mas v. Owens-Illinois Glass Co., Supra;
Cannon v. Time, Inc., et al., Supra;
Hedrick v. Canadian Pacific Railway Co.,
Supra. [13]

EXHIBIT A

In the District Court of the United States, in and
for the Southern District of California, Central
Division

Civil Action No. 9134-Y

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

AFFIDAVIT OF E. H. PREUER

State of California,
County of Los Angeles—ss.

E. H. Preuer being first duly sworn, deposes and
says: That he is the sole owner of Woodworkers
Supply Company, 1222 Santa Fe Avenue, Los An-
geles, California; that on or about the 27th day of
January, 1949, he was served with a copy of sum-

mons and complaint in the above-entitled action; that he is not an officer, a managing or general agent, or an agent authorized by appointment or law to receive service of process for and/or on behalf of Woodworkers Tool Works, a corporation, which is a corporation organized and existing under and by virtue of the laws of the State of Illinois.

Further affiant sayeth not.

/s/ E. H. PREUER.

Subscribed and sworn to before me this 25th day of Feb. 1949.

/s/ Illegible,

Notary Public in and for said County and State.

EXHIBIT B

In the District Court of the United States, in and for the Southern District of California, Central Division

Civil Action No. 9134-Y

WILLIAM J. BYRNE,

Platintiff,

vs.

WOODWORKERS TOOL WORKS, a corporation,

Defendant.

AFFIDAVIT OF ROBERT E. DUNNE

State of California,
County of Los Angeles—ss.

Robert E. Dunne, being first duly sworn, deposes

and says: That he is one of the counsel for defendant, Woodworkers Tool Works, a corporation organized and existing under and by virtue of the laws of the State of Illinois; that up to and including the date of this affidavit neither said defendant, nor any of its agents or employees, have been served with process in the above-entitled action; that said defendant was not at the time of the service of process upon E. H. Preuer, and is not now, doing business in the State of California so as to render it amenable to the service of process in this action.

/s/ ROBERT E. DUNNE.

Subscribed and sworn to before me this 25th day of Feb., 1949.

/s/ ELIZABETH P. WILLIAMS,
Notary Public in and for said County and State.

Affidavit of service by Mail attached.

[Endorsed] Filed February 28, 1949. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF RAY TAYLOR

State of California,
County of Los Angeles—ss.

Ray Taylor being first duly sworn deposes and says that he is employed by Pacific Employers Insurance Company of Los Angeles, California in the capacity of investigator. During the course of his

employment, he had reason to investigate the circumstances surrounding the sale to the Selby Company by Woodworkers Tool Works of a Champion Panel Head 1¼ bore, right hand. That affiant visited the Selby Company, purchasers of the said panel head and also visited the Woodworkers Supply Company of Los Angeles, and there interviewed the employees of the supply company and Mr. E. H. Preuer, owner of the Woodworkers Supply Company; that affiant was informed and his investigation revealed that the Selby Company, through their manager, William R. Walker, called the Woodworkers Supply Company [19] and asked that they send a representative to the Selby plant. That a representative by the name of Jack Townsend visited the Selby Company in response to the said request of William R. Walker, and there showed Mr. William R. Walker a catalog of the Woodworkers Tool Works, an Illinois corporation, and that Mr. Walker ordered the said panel head from the said catalog through Mr. Townsend. That a purchase order was signed by the Selby Company to the Woodworkers Supply Company and an invoice was prepared by the Woodworkers Supply Company for the purchase of said panel head. That the said panel head was delivered air express by the Woodworkers Tool Works directly and that the Woodworkers Supply Company billed the Selby Company for said panel head directly. Said invoice was sent to the Selby Company by the Woodworkers Supply Company, a copy of which is attached hereto

and made a part of this affidavit. Affiant was informed by Mr. Preuer that Woodworkers Supply Company keeps in its place of business a catalog of Woodworkers Tool Works and affiant saw the said catalog; that on the face of the said catalog are the words "Woodworkers Tool Works" and their Chicago address; that affiant's investigation revealed that Woodworkers Supply Company represented Woodworkers Tool Works throughout this complete sales transaction, and that at no time did Selby Company directly contact Woodworkers Tool Works about the same; that all contacts were exclusively through the Woodworkers Supply Company.

/s/ RAY F. TAYLOR.

Subscribed and sworn to before me this 15th day of March, 1949.

[Seal] /s/ RUTH D. FISHER,
Notary Public in and for said county and state.

INVOICE

WOODWORKERS' SUPPLY CO.

Woodworking Machinery and Supplies
 1222 Santa Fe Avenue Phone Vandike 4127
 Los Angeles 21, California

Date October 25, 1948

Terms net 10th prox-net 30 days

Your Order No. 1957

Your Requisition No.....

Our Order No. 15761

1—Champion Panel Head 1¼" bore right	
hand sold f.o.b. Chicago, Ill.....	\$75.00
sales tax 2½%.....	1.88
	<hr/>
	\$76.88

shipped directly to customer from factory
 10-23-48 air express

2 telephone calls at customers	2.79
request 10-12 and 10-19.....	3.94
	<hr/>
	\$83.61

2—telegrams—no charge

Approved For Payment.....

Do not Pay this was defective head.

/s/ JAS.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM R. WALKER

State of California,
County of Los Angeles—ss.

William R. Walker being first duly sworn, deposes and says:

That during the month of October, 1948, and some time prior thereto, he was employed by the Selby Company and worked at said Selby Company in the capacity of manager;

That on or about October 23, 1948, affiant, in his capacity as manager of said Selby Company, determined that the said company was in urgent need of a Champion Panel Head, 1 $\frac{1}{4}$ bore, right hand, and that thereupon affiant telephoned the Woodworkers Supply Company and requested that they send a salesman to see him;

That thereafter a salesman from the Woodworkers Supply Company, whose name is Jack Townsend, visited affiant at the [21] Selby Company's place of business, and brought with him a catalog upon which appeared the words "Woodworkers Tool Works" and affiant ordered a panel head from said catalog and at said time was informed by said salesman, Jack Townsend, that the Champion panel head ordered was manufactured by the Woodworkers Tool Works, an Illinois corporation, and that he, as salesman for Woodworkers Supply Company, represented the Woodworkers Tool Works.

At said time and place, affiant or his employer,

Jim Selby, signed a purchase order to the Woodworkers Supply Company, and the Woodworkers Supply Company thereupon ordered said panel head from the Woodworkers Tool Works, which was shipped direct to the Selby Company from the Woodworkers Tool Works by Air Express on October 23rd, 1948. That said Selby Company was billed by the Woodworkers Supply Company in the total amount of \$83.61, said sum representing the purchase price of \$75.00, \$1.88 tax, and \$6.73 representing two telephone calls to Woodworkers Tool Works from Woodworkers Supply Company.

That to affiant's own personal knowledge said Selby Company, through affiant, has ordered other products from Woodworkers Tool Works through the Woodworkers Supply Company.

/s/ WILLIAM R. WALKER.

Subscribed and sworn to before me this 15th day of March, 1949.

[Seal] /s/ RUTH D. FISHER,
Notary Public in and for said County and State.

Frank M. Jordan,
Secretary of State

Office of the Secretary of State
State of California, Sacramento 3

December 17, 1948

Olson, Olson & Olson, Attorneys,
639 South Spring Street,
Los Angeles 14, California.

Attention: Mr. John W. Olson.

Dear Sir:

In reply to your letter of December 15th we advise that we find no record in this office of a corporation named Woodworkers Tool Works.

No designation of agent for service of process has been filed in this office by a corporation of said name.

Very truly yours,

/s/ FRANK M. JORDAN, EB
Secretary of State.

EB [23]

Points and Authorities

1. "Service of summons and complaint upon a foreign corporation must be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other

agent authorized by appointment or by law to receive service of process.....”

Rule 4d (3) (7) of the Fed. Rules of Civil Proc.

2. “A federal district court has jurisdiction over suits between citizens of different states but to obtain that jurisdiction there must be valid service on defendant within the district and where defendant is a foreign corporation. Validity of service depends on whether the corporation was doing business in such a manner and to such extent as to warrant inference that, through its agents, it was present in the district.”

Hinchcliffe Motors, Inc. v. Willys-Overland Motors, Inc., 30 Fed. Supp. 580.

3. “The rationale of all rules for service of process on corporations is that service must be made on a representative so integrated with the corporation sued as to make it a priori supposable that he will realize his responsibilities and know what he should do with any legal papers served upon him.”

Operative Plasterers & Cement Finishers International Association of the U. S. & Canada v. Case. 93 Fed. II 56.

4. “A service of summons and complaint on a sales representative of a foreign corporation which was not registered in the state and which had not appointed an agent upon whom service could be made but which sold its products within the state through representatives who were paid on a commission basis and who maintained [24] offices which

were identified by name of the corporation was a valid service upon that corporation.”

Fort Wayne Corrugated Paper Co. v. Anchor.
Hocking Glass Corp. 31 Fed. Supp. 403.

5. “Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Co. were delivered in the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky but might there receive payment in money, checks or drafts.”

International Harvester Co. of America v.
Commonwealth of Kentucky. 234 U. S. 579.

6. “The persistent efforts of foreign corporations to evade service of jurisdictional processes in the states has led some courts to suggest the application of a practical test, that where the defendant corporation’s local activities justify it, the defendant be drawn from its home state as in this case, upon the grounds of fairness; instead of sending plaintiff to Virginia or Illinois to try its case, bring defendant here.”

Moore Machinery Co. v. Stewart Warner
Corporation 27 Fed. Supp. 526 (Cal.)

7. “The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority in him; and if he be that kind of an agent, the implication will be made (of authority) notwithstanding a denial of

authority on the part of the other officers of the corporation.”

Connecticut Mutual Life Ins. Co. v. Spratley
172 U. S. 602.

8. “We hold the true rule to be * * * that every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made.”

Roehl v. Texas Co. 107 C A 691 (704).

9. “I think that when a foreign corporation not only accepts orders, but fills the same and receives the pay therefore through the instrumentality of an agent located within this state it should for all reasonable and practicable purposes be said to have come here. To the extent of such activities it is doing all that it could do if it had here opened an office under its own name. The facts disclosed are sufficient to bring the case within the authority of International Harvester.”

Davis v. Motive Parts Corp. 16 Fed II 148.

In accord:

Milbank v. Standard Motor Construction Co.
22 Pac. II 271.

The Thew Shovel Co. v. Superior Court 35
CA II 183.

American Asphalt Roof Corp. v. Shanlaland
219 N W 28.

60 A L R at Page 1030.

Affidavit of service by Mail attached.

[Endorsed]: Filed March 16, 1949. [26]

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of March in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

ORDER

For hearing motion of defendant filed Feb. 28, 1949, to dismiss the action and quash service of summons; John W. Olson, Esq., appearing as counsel for plaintiff; R. E. Dunne, Esq., appearing as counsel for defendant; said attorneys argue to the Court;

Court orders said motion denied, and that defendant have 20 days to answer. [28]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT
FOR PERSONAL INJURIES

Comes Now the plaintiff and complains of defendant above-named and for cause of action alleges as follows:

I.

That at all times hereinafter referred to, plaintiff was and is a resident of the County of Los Angeles, State of California, and a citizen of the State of California.

II.

That defendant is and was at all times hereinafter mentioned a corporation, duly organized and existing by virtue of the laws of the State of Illinois, engaged in manufacturing machine tools, and in the business of selling machine tools in the State of California.

III.

That plaintiff is a citizen of the State of California, [29] and defendant is a corporation incorporated under the laws of the State of Illinois. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

IV.

That at all times hereinafter mentioned, plaintiff was regularly employed by E. George Selby, doing business as Selby Company, in the County of Los Angeles, State of California.

V.

That on or about the 23rd day of October, 1948, plaintiff's employer purchased from defendant a new Champion panel raiser head, 1¼ bore, right hand, hereinafter referred to as "panel head," designed, manufactured and sold by said defendant for cutting lumber. That said panel head was installed for use in cutting lumber at the place of business of plaintiff's employer on or about the 26th day of October, 1948, and plaintiff was employed to cut lumber with the same.

VI.

That defendant sold the said panel head to plaintiff's employer for the express purpose of its being used and operated as plaintiff was operating it when injured as hereinafter described. That defendant impliedly warranted the structural safety of said panel head against breaking and injuring plaintiff.

VII.

That on or about the 28th day of October, 1948, at approximately 8:45 a.m. of said day, plaintiff, while relying upon said implied warranty and while in the regular course of his employment, was engaged in cutting lumber with said panel head. That at said time and place, said panel head, revolving at hundreds of revolutions per minute, suddenly broke from structural defects, a piece of which struck plaintiff, directly and proximately causing the injuries and damages to plaintiff hereinafter described.

VIII.

That until plaintiff William J. Byrne was injured as aforesaid, he was a strong, active and healthy man in body and mind.

IX.

That the force and impact of the piece of said panel head as it struck the plaintiff was such as to inflict serious and permanent injuries to plaintiff; that plaintiff suffered severe lacerations of his right hand; that plaintiff has suffered and is still suffering great physical pain and mental stress from said injuries; that at the time of said injury plaintiff was thirty-three (33) years old; that he was earning and capable of earning from Two Hundred and Sixty (\$260.00) Dollars to Two Hundred and Seventy-Five (\$275.00) Dollars per month; that due to said injury, plaintiff has been and will be totally disabled from pursuing his usual occupation as a mill worker and will be permanently partially disabled from performing any labor as a mill worker or any work depending upon the full use of his right hand; that ever since the said accident, plaintiff has been under the care of physicians for said injuries and has incurred medical expenses in the sum of Two Hundred and Fifty (\$250.00) Dollars; that further medical expenses are being incurred by plaintiff as a result of said personal injuries, and plaintiff asks leave of the Court to amend this complaint when the full amount of such medical expenses is ascertainable.

X.

That plaintiff has thus been damaged by defendant's having sold and delivered to plaintiff's employer said structurally defective panel head, and defendant's breach of warranty as to its safety, in the sum of Thirty Thousand (\$30,000.00) Dollars.

For a Second, Separate and Further Cause of Action, plaintiff complains of defendant above named and alleges as follows:

I.

That the allegations contained in paragraphs I, II, III, IV and V of plaintiff's first cause of action herein are true and correct, and are hereby incorporated with the same force and effect as though fully set forth herein.

II.

That defendant was negligent and careless in the manufacture, sale and delivery to plaintiff's employer of a structurally defective panel head.

III.

That on the 28th day of October, 1948, at approximately 8:45 a.m. of said day, plaintiff, in the regular course of his employment, was engaged in cutting lumber with said panel head. That at said time and place, said panel head, revolving at hundreds of revolutions per minute, suddenly broke from structural defects, a piece of which struck plaintiff, directly and proximately causing the injuries and damages to plaintiff hereinafter described.

IV.

That the allegations contained in paragraphs VIII and IX of plaintiff's first cause of action herein are true and correct, and are hereby incorporated with the same force and effect as though fully set forth herein.

V.

That as a direct and proximate result of defendant's negligence and carelessness in manufacturing, selling and delivering a structurally defective panel head to plaintiff's employer, plaintiff has been damaged in the sum of Thirty Thousand (\$30,000.00) Dollars. [32]

Wherefore plaintiff prays judgment against defendant as follows:

1. For the sum of \$30,000.00 as damages.
2. For medical expenses when the total has been ascertained.
3. For costs of suit herein incurred.
4. For such other and further relief as is just and proper.

/s/ JOHN W. OLSON,
Attorney for Plaintiff.

Duly verified.

Affidavit of service by Mail attached.

[Endorsed]: Filed April 5, 1949. [33]

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED
COMPLAINT

Comes now the defendant Woodworkers Tool Works, a corporation, and for answer to the second cause of action of plaintiff's second amended complaint alleges, admits and denies:

I.

Answering paragraph I of this cause of action:

A. This answering defendant has no information or belief upon the subject sufficient to enable it to answer paragraph I and IV incorporated therein and upon this ground denies generally and specifically each, every and all of the allegations in the said paragraphs contained.

B. Answering the incorporated paragraph II of this cause of action defendant admits that it was and is a corporation duly organized and existing by virtue of the laws of the state of Illinois engaged in the manufacturing machine tools, but denies that it is in the business of selling machine tools in the state of Calif. [35]

C. Answering the incorporated paragraph III of this cause of action defendant admits that it is a corporation incorporated under the laws of the state of Illinois; further answering said paragraph this answering defendant alleges that it has no information or belief sufficient to enable it to answer

the remaining allegations in said paragraph contained and upon that ground denies generally and specifically each, every and all of the remaining allegations.

D. Answering the incorporated paragraph V defendant admits that it sells Champion panel raiser heads; that it partially manufactured said article, but alleges in this connection that it did not cast the said raiser head nor any part thereof; denies that plaintiff's employer purchased said Champion panel raiser head from this defendant; further answering said incorporated paragraph V defendant has no information or belief sufficient to enable it to answer the remaining allegations in said paragraph contained and upon that ground denies generally and specifically each, every and all of the remaining allegations.

II.

This answering defendant denies generally and specifically each, every and all of the allegations set forth in paragraph II and in this connection alleges that this defendant did not sell the Champion panel raiser head to plaintiff's employer.

III.

This answering defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the remaining allegations in said complaint contained, and upon this ground denies generally and specifically:

(a) Each, every and all of the allegations con-

tained in paragraphs III, IV, V and the paragraphs incorporated in paragraph IV of said second cause of action, and not hereinbefore specifically admitted.

(b) That the plaintiff, through the happening of said alleged, or any, accident:

(1) Was injured or damaged in the manner or to the extent alleged, or in any other manner, or to any extent, or at all.

(2) Suffered damages in the sums alleged in paragraph V or in paragraph IX, which is incorporated in paragraph IV of this cause of action, or in any other sums, or at all.

(3) Was obliged to incur or did incur medical expenses in the sum alleged in the said incorporated paragraph IX, or in any other sum, or at all; or that plaintiff will be required to expend additional sums for his future care as alleged in said paragraph IX, or in any other sum, or at all.

(4) Suffered a total disability as alleged in the said incorporated paragraph IX, or in any other manner, or at all; that plaintiff suffered, or will suffer a partial disability as alleged, or in any other manner, or at all.

(5) Suffered a loss in his earnings as alleged in said incorporated paragraph IX, or in any other sum, or at all.

(c) That plaintiff was capable of earning, or was earning at the time of said alleged, or any, accident, the sums specified in said incorporated paragraph IX, or any sum, or at all.

(d) Each, every and all of the allegations in said cause of action contained, and not hereinbefore admitted or denied.

IV.

That the said alleged accident, or injury, or damage, or either or any thereof, was caused or occasioned, or in any manner contributed to by the said, or any, carelessness, negligence, fault or liability on the part of this answering defendant, its agents or employees, or either or any of them.

Further Answering Plaintiff's Second Amended Complaint, [37] and by Way of a First, Separate and Affirmative Defense to the Second Cause of Action Therein Contained, Defendant Alleges:

I.

This answering defendant is informed and believes, and upon such information and belief alleges, that at the time and place mentioned in said complaint, the plaintiff failed to govern and control his movements in a reasonable manner commensurate with the alleged existing conditions, and by his failure to exercise ordinary care and caution, as aforesaid, for his own safety or welfare, or to avoid the happening of said alleged accident, injury or damage, if any, did thereby directly and proximately contribute to the happening of said alleged accident, injury or damage complained of, and to each and all and the whole thereof.

Further Answering Plaintiff's Second Amended Complaint, and by Way of a Second, Separate and Affirmative Defense to the Second Cause of Action Therein Contained, Defendant Alleges:

I.

That the said alleged accident, or injury, or damage or either or any thereof, was an unavoidable accident and was not caused or occasioned, or in any manner contributed to, by the said, or any, carelessness, negligence, fault or liability on the part of this answering defendant, its agents or employees, or either or any of them.

Wherefore, this answering defendant prays that plaintiff take nothing by his second amended complaint, that this defendant have judgment for its costs herein incurred, and for such other and further relief as to the court may seem proper.

TRIPP & CALLAWAY,

By /s/ ROBERT E. DUNNE,
Counsel for Defendant.

Duly verified.

Copy received.

[Endorsed]: Filed May 2, 1949. [38]

[Title of District Court and Cause.]

MOTION TO DISMISS PLAINTIFF'S FIRST
COUNT OR CAUSE OF ACTION OF THE
SECOND AMENDED COMPLAINT AND
FOR A MORE DEFINITE STATEMENT.

Comes now the defendant Woodworkers Tool Works, a corporation, and files this its Motion to Dismiss Plaintiff's First Count or Cause of Action of the Second Amended Complaint and for a More Definite Statement and for grounds of dismissal therefor states:

I.

The said first count or cause of action of the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

And For Grounds For A More Definite Statement States:

II.

The first count or cause of action of the Second Amended Complaint fails to state where the purported purchase of the Champion panel raiser head was consummated. [40]

III.

The first count or cause of action is so unintelligible, ambiguous and contradictory in its entirety that the defendant is unable to properly and fairly answer the same.

Said Motion to Dismiss and the Motion for More Definite Statement will be made and based upon all of the files, papers and proceedings in this cause, including said Second Amended Complaint, this motion, and the notice of the hearing thereof, and upon the brief in support of this motion filed and served herewith.

Dated: Los Angeles, California, April 30, 1949.

TRIPP & CALLAWAY,

By /s/ ROBERT E. DUNNE,
Counsel for Defendant.

Receipt of Copy attached.

[Endorsed]: Filed May 2, 1949. [41]

[Title of District Court and Cause.]

NOTICE OF MOTION

To: William J. Byrne, the plaintiff above-named,
and to John W. Olson, 639 South Spring Street,
Los Angeles 14, California, his attorney:

You, and Each of You, Will Please Take Notice that the undersigned will bring the attached Motion to Dismiss Plaintiff's First Count or Cause of Action and For A More Definite Statement on for hearing before this Court in the Court Room of the Honorable Leon R. Yankwich, Judge of the above-entitled Court, located in Court Room 5 of the Federal Building, 312 North Spring Street, in the City

and County of Los Angeles, State of California, on the 16th day of May, 1949, at 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard.

Dated: Los Angeles, California, April 30, 1949.

TRIPP & CALLAWAY,

By /s/ ROBERT E. DUNNE,
Counsel for Defendant.

Receipt of Copy attached.

[Endorsed]: Filed May 2, 1949. [43]

United States District Court, Southern District of
California, Central Division

No. 9134-Y

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a Corpora-
tion,

Defendant.

Honorable Leon R. Yankwich, Judge.

DECISION ON MOTIONS

The various motions of the defendant heretofore argued and submitted are now decided as follows:

I.

The motion of the defendant to dismiss the plaintiff's first count or cause of action of the Second Amended Complaint is hereby granted.

II.

The motion of the defendant for a more definite statement of the first count or cause of action of the Second Amended Complaint is hereby denied.

The plaintiff may have ten days within which to amend, if so advised.

Comment

The first count of the Second Amended Complaint seeks recovery on the basis of warranty. It is distinctly [45] alleged that the defendant sold the panel head to plaintiff's employer "for the express purpose of its being used and operated as plaintiff was operating it when injured as aforesaid. That defendant warranted the structural safety of said panel head against breaking and injuring plaintiff."

As our jurisdiction stems from diversity, the matter is governed strictly by California law. (*Meredith v. Winter Haven*, 1943, 320 U. S. 228). And the law of California makes liability dependent in such cases on negligence and not on warranty. (Cal. Civil Code, sec. 1735.)

(*Kalash v. Los Angeles Ladder Co.*, 1934, 1 Cal. 2d 229; *Escola v. Coca Cola Bottling Co.*, 1944, 24 C. 2d 452): Counsel for the plaintiff has pressed upon us the views of Mr. Justice Traynor in the *Escola* case. However, we cannot follow them because they

are his personal views and not those of the Court. The main opinion written by Mr. Chief Justice Gibson has the concurrence of four of the Justices, more than a majority of the Court. At times when a concurring opinion is necessary in order to reach a majority, its reasoning may have force. But when a majority of the Court has decided a case upon one ground, the views of any minority contained in a concurrent opinion loses all significance. The opinion of Mr. Justice Traynor shows clearly that he is not satisfied with the ground upon which the majority based their decision. Indeed, the first paragraph of his opinion reads:

“I concur in the judgment, but I believe the manufacturer’s negligence should no longer be singled out as the basis of a plaintiff’s right to recover in cases like the present one.”

(Emphasis added.)

It is evident, therefore, that by his concurring opinion, he sought to base liability upon broader grounds [46] than those contained in the majority opinion. Regardless of the strength of these views, we are bound to follow the California law as declared by the highest court and that view, as expressed in this case, does not sanction action on the basis of warranty. It merely sanctions recovery on the basis of negligence.

Hence the ruling above made.

Dated this 1st day of August, 1949.

/s/ LEON R. YANKWICH,

[Endorsed]: Filed August 1, 1949. [47]

[Title of District Court and Cause.]

STIPULATION RE DEPOSITION

It Is Hereby Stipulated by and Between the parties to the above-entitled action, through their respective attorneys, that Woodworkers Tool Works, an Illinois Corporation, with its principal office at 222 South Jefferson, Chicago 6, Illinois, may take the deposition of its Vice President, William J. Knourek, 820 William Street, River Forest, Illinois, and its shop superintendent, Charles Meissner, 10037 South Wallace, Chicago, Illinois, at Room 1325, Number I, North LaSalle Street, Chicago, Illinois, before Peter V. Kuhn, a duly authorized Notary Public, or any other duly authorized officer before whom depositions may be taken, on February 7, 1950, at 4 o'clock p.m.

Dated: January 27th, 1950.

/s/ JOHN W. OLSON,
Attorney for Plaintiff.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,
Attorneys for Defendant.

[Endorsed]: Filed January 30, 1950. [48]

[Title of District Court and Cause.]

REQUESTED JURY INSTRUCTIONS
REFUSED BY THE COURT

Refused:

/s/ LEON R. YANKWICH,
Judge. [49]

DEFENDANTS REQUESTED
JURY INSTRUCTIONS

Defendants' Requested Instruction No. ...

When in the manufacture of such an article as the Panel Raiser Head here involved there is used any material or part obtained from a source outside the manufacturing plant in question, it is the duty of the manufacturer to make such inspections and tests of that imported material or part as ordinary prudence would indicate to be necessary, to the end that the safety of the finished article for the intended or invited use will be reasonably certain. Failure to fulfill that duty is negligence. On the other hand, if the manufacturer performs that duty, and the inspections and tests do not indicate a defective or dangerous condition, and it does not know of such a condition, it is not liable for injury resulting from its use of such material or part, although it prove to be defective.

Based on Instruction Number 218 in the book of
Approved Jury Instructions.

B A J I.

O'Rourke vs. Day & Night Water Heater Co.,
31 C. A. (2d), 364.

Y

Given

Given as Modified

Rejected..... [51]

Defendants' Requested Instruction No. ...

You are hereby instructed that the reasonable-
ness of the inspections necessary to determine
whether a manufactured article is safe for use
varies with the circumstances of each case, and the
purpose for which the article is intended must be
considered, that is to say, that a manufactured
article need not be absolutely safe for all purposes
but only for the purpose for which it was manu-
factured; therefore, if you find that the defendant
properly made inspections reasonable designed to
find defects which would render the Panel Raiser
Head unsafe for cutting and trimming wood, you
must find that those inspections were reasonable;
and if you find that the said inspections did not
reveal any such defects in the Panel Raiser Head,
then you must find that the defendant was not

negligent in the manufacture of the Panel Raiser Head.

O'Rourke vs. Day & Night Water Heater Co.,
31 C. A. (2d), 364.

Y

Given
Given as Modified
Rejected..... [52]

Defendants' Requested Instruction No. ...

You are hereby instructed that if you find that the defendant used the machinery, methods and processes, which are accepted as standard in the trade and which are as reliable and satisfactory as any others in the manufacture of such an article, it did not fail in the exercise of proper care.

Gerber v. Faber, 54 C. A. (2d), 674 at 680.

Given
Given as Modified
Rejected..... [53]

Defendants' Requested Instruction No. ...

You are hereby instructed that reasonable care is making the inspections and tests during the course of manufacture which the manufacturer should recognize as reasonably necessary to secure the production of a reasonably safe article; therefore, if you find that the defendant properly inspected the casting which it purchased from another manufacturer, and if you find that the defendant properly inspected the completed Panel Raiser Head you

must find that defendant exercised reasonable care.

Gerber v. Faber, 54, C. A. (2d), 674 at 680.

Y

Given

Given as Modified

Rejected..... [54]

INSTRUCTIONS TO THE JURY
REQUESTED BY PLAINTIFF

To The Honorable Leon R. Yankwich, Judge of
Said Court:

Counsel for plaintiff respectfully requests the
attached instruction to the jury in the above-entitled
action.

.....

John W. Olson,

Attorney for Plaintiff. [55]

Plaintiffs Instruction Number

You are instructed that, under the uncontradicted
evidence in this case, the Plaintiff, William J.
Byrne, is entitled to a verdict and you are, there-
fore, instructed to return a verdict against the
defendant and in favor of the Plaintiff William J.
Byrne for such sum as damages as you may find
from a preponderance of the evidence that he should
be awarded, measured by the Court's instructions.

Given

Given as Modified

Not Given [56]

Plaintiffs Instruction Number

It is alleged in the answer of defendant that any injury sustained by the plaintiff was directly, proximately and concurrently contributed to be negligence and recklessness on the part of the plaintiff.

There is no evidence of contributory negligence on the part of plaintiff and you are instructed to find that issue in favor of plaintiff.

Y

Given

Not Given

[57]

Given as Modified

Plaintiffs Instruction Number

You are instructed that the proximate cause of an injury is that cause which produces the injury and without which the result would not have occurred. It is the cause that sets in operation the factors that accomplish the injury.

If you find that plaintiff was injured as alleged, and that his injury occurred as a consequence of defendant's negligence as alleged; that is, if it set in operation the factors that accomplished the injury, then you will find that defendant's negligence was the proximate cause of the injury.

Y

Given

Given as Modified

Not Given

[58]

Plaintiffs Instruction Number

You are instructed that if the defective condition of the part could have been disclosed by reasonable inspection and tests and such tests and inspections were omitted, then the defendant has been negligent. You are further instructed that reasonable care under this instruction consists of making inspections and tests during the course of manufacture, and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article considering the nature of the article and the purpose for which it was to be used.

O'Rourke vs. Day and Night Water Heater Company, Ltd., 31 Cal. App. (2d) 364 88 Pac. (2) 191.

Smith vs. Peerless Glass Company, Inc., 259 N. Y. 292 (181 N. E. 576).

Y

Given

Given as Modified

Not Given

[59]

Plaintiffs Instruction Number

You are instructed that the degree of care necessary to be exercised by a manufacturer in the production of a product varies with the danger to be expected from the product, and you are further instructed that the kind of inspection called for on

the part of the manufacturer varies with the nature and danger of the thing inspected.

- O'Rourke vs. Day and Night Water Heater Co., Ltd., 31 Cal. App. (2d) 364.
- McPherson vs. Buick Motor Company, 217 N. Y. 382.

Y

Given	
Given as Modified	
Not Given	[60]

Plaintiff's Instruction No. ...

There is in our law a doctrine applying to negligence cases which is commonly known as the doctrine of "res ipsa loquitur." Literally translated from the Latin, this means "the thing speaks for itself".

That doctrine means that if a subject matter is shown by the evidence to have been manufactured and supplied for a particular use, and an injury to some person results from such usage, which would not have occurred in the ordinary course of things, if ordinary and proper care had been used in its manufacture, the thing or subject matter speaks for itself and the law raises the presumption that the manufacturer did not use ordinary and proper care in its production. The burden would then be on the manufacturer to substantially prove that ordinary and proper care was used in the manufacturing and supplying of such subject matter. However, the manufacturer is not responsible for defects

that cannot be found by a reasonable, practicable inspection.

[Underscored lines in pencil—alterations on original typed copy.]

Gladys Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. II, 453.

Sheward, et al. v. Virtue, et al., 20 Cal. II, 410, 126 Pac. II, 345.

McKinney v. Digest, Vol. 17, p. 74.

Rafter v. Dubrock's Riding Academy, 75 Cal. App. II, 621.

Y [61]

Plaintiffs Instruction Number

From the happening of the accident involved in this case, as established by the evidence, unless overcome by contrary evidence or inferences from such evidence, there arises the inference that the proximate cause of the occurrence was negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff.

[Underscored lines are pencil alterations on original typed copy.]

Y

Given

Given as Modified

Not Given

Plaintiff's Instruction No...

In this case if you find from the evidence that plaintiff was injured by the disintegrating or breaking apart of the appliance in question, described as a "Panel Raiser Head" while plaintiff was employed in connection with its use for the purpose for which it was manufactured and supplied and if you further believe from the evidence that this accident and injury would not have occurred if the Panel Raiser Head had been properly manufactured and constructed and ordinary and proper care had been used in its manufacture, and that the accident was not due to faulty installation or operation, over which the defendant had no control, you are instructed that these facts would raise a presumption of negligence on the part of defendant in failing to use ordinary and proper care in the manufacturing and supplying of the Panel Raiser Head. The burden of proof would then be on the defendant to overcome this presumption and free itself from the charge of negligence by substantially proving that it did use ordinary and proper care in that respect.

[Underscored lines are pencil alterations on original typed copy.]

Gladys Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. II, 453.

Sheward, et al. v. Virtue, et al., 20 Cal. II, 410, 126 Pac. II, 345.

McKinney v. Digest, Vol. 17, p. 74.

Rafter v. Dubrock's Riding Academy, 75 Cal. App. II, 621.

Plaintiff's Instruction No. . . .

The uncontradicted evidence and admission of the parties in this case are that the appliance or instrumentality called a Panel Raiser Head was manufactured and supplied by defendant, and that the plaintiff suffered personal injury while employed in connection with its operation when it disintegrated or broke apart.

If you believe from the evidence that plaintiff was injured while employed in connection with the use of the Panel Raiser Head and that the injury he complains of in this action was directly and proximately caused by the disintegrating or breaking apart of the Panel Raiser Head while the same was being used for the purpose for which it was manufactured and supplied and if you further believe from the evidence that the Panel Raiser Head disintegrated or broke apart because of defects due to negligence of defendant to use ordinary and proper care in manufacturing and supplying it, then it will be your duty to return a verdict for plaintiff.

Gladys Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. II, 453.

Sheward, et al. v. Virtue, et al., 20 Cal. II, 410, 126 Pac. II, 345.

McKinney v. Digest, Vol. 17, p. 74.

Rafter v. Dubrock’s Riding Academy, 75 Cal.
App. II, 621.

Given

Given as Modified

Not Given [64]

Plaintiff’s Instruction No. ...

The uncontradicted evidence in this case is that the Panel Raiser Head in question was manufactured and supplied by the defendant. That it disintegrated or broke apart while it was being used for the purpose for which it was manufactured and sold by the defendant. That such an accident does not ordinarily occur in such use of a Panel Raiser Head properly constructed.

You are therefore instructed that these facts raise the presumption that defendant did not use ordinary and proper care in the manufacturing of the Panel Raiser Head and that the burden is on the defendant to overcome this presumption and free itself from the charge of negligence by substantially proving that ordinary and proper care was used in the manufacturing of the Panel Raiser Head.

Gladys Escola v. Coca Cola Bottling Co. of
Fresno, 24 Cal. II, 453.

Sheward, et al. v. Virtue, et al., 20 Cal. II,
410, Pac. II, 345.

McKinney v. Digest, Vol. 17, p. 74.

Rafter v. Dubrock's Riding Academy, 75 Cal.
App. II, 621.

Given

Given as Modified

Not Given

[65]

Plaintiffs Instruction Number

You are instructed that general damages are such as the law implies or presumes to have occurred from the wrong complained of, or such as naturally or ordinary follow the wrong complained of. They are such as will compensate the party injured reasonably for any pain, discomfort and anxiety suffered by him, and proximately resulting from the injury in question, and for such pain, discomfort and anxiety, if any, as he is reasonably certain to suffer in the future from the same cause.

Given

Given as Modified

Not Given

[66]

Plaintiffs Instruction Number

You are instructed that in determining the amount of damages to which the plaintiff may be entitled in this case, you will consider the nature, extent and severity of such injury or injuries, if any, sustained by him as the proximate result of defendant's negligence; whether such injury or injuries were temporary or of a permanent nature; the extent, degree and character of suffering, mental and phy-

sical, from such injury; the duration and severity thereof; any medical expenses incurred or likely to be incurred, including nursing care and attendance; loss of time and value thereof; and loss of present and/or future earning capacity, if any, resulting therefrom. From all of these circumstances you are to resolve what sum will fairly compensate the plaintiff for the injuries which you find that he has so sustained, not exceeding the sum of \$30,000.00.

Given

Given as Modified

Not Given

[67]

Plaintiffs Instruction Number

You are instructed that special damages as distinguished from general damages are those which are natural but not necessary consequences of a negligent act. They are damages which, as such, were incurred by the particular individual by reason of the particular circumstances. They are such as will compensate plaintiff for the reasonable value, not exceeding cost to plaintiff, of the examinations, attention, care by physicians and surgeons, reasonably required and actually given in the treatment of plaintiff, and reasonably certain to be required and to be given in his future treatment, and included in such care, X-ray pictures, the reasonable value not exceeding the cost to plaintiff of the services of nurses, attendants, hospital accommodations and ambulance service, if any, and reasonably certain to be required and given in his future treatment, if

any, and finally, the special damages are such as will compensate plaintiff for the reasonable value of the time lost, if any, by plaintiff since his injury wherein he has been unable to pursue his occupation. In determining this amount, you should consider such plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injuries, and further consider the evidence as to the probability and possibility of plaintiff pursuing his occupation or any occupation in the future.

Y

Given

Not Given

Given as Modified

[Lodged]: Feb. 16, 1950.

[Endorsed]: Filed Feb. 20, 1950. [68]

United States District Court, Southern District of
California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

VERDICT

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff’s special damages at Eight Thousand Dollars, and fix plaintiff’s general damages at One Thousand Dollars.

Dated: February 21st, 1950.

/s/ GEO F. CALDWELL,

Foreman of the Jury.

[Endorsed]: Filed February 20, 1950. [87]

United States District Court, Southern District of
California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

JUDGMENT ON VERDICT

The above-entitled cause was tried before the Court and a duly-impanelled jury, on February 16, 17, 20, 21, 1950; and oral and documentary testimony was admitted in evidence; John W. Olson, Esq., appeared as counsel for plaintiff; and Hulen C. Callaway, Esq., and F. V. Lopardo, Esq., appeared as counsel for defendant.

On February 20, 1950, said cause was submitted to the jury; which presented its verdict February 21, 1950, after deliberation. On order of the Court, the jury was polled and each member thereof stated that the verdict as presented and read was his verdict. Whereupon, the Court ordered that said verdict be filed and entered, said verdict being as follows:

“United States District Court, Southern District,
of California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

VERDICT

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, [88] and against the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff’s special damages at Eight Thousand Dollars, and fix plaintiff’s general damages at One Thousand Dollars.

“Dated: February 21st, 1950.

“GEO. F. CALDWELL,
Foreman of the Jury.”

Now, therefore, by virtue of the law and by reason of the aforesaid premises,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiff, William J. Byrne, do have and recover of and from the defendant, Woodworkers Tool Works, a corporation, the sum of Nine Thousand Dollars (\$9,000.00), together with costs taxed at \$78.00.

Dated: Los Angeles, California, February 23,
1950.

EDMUND L. SMITH,
Clerk.

By /s/ JOHN A. CHILDRESS,
Deputy.

[Endorsed]: Filed and Entered February 23,
1950.

[See page 65]: Amended Mar. 16, 1950. [89]

[Title of Court.]

NOTICE BY CLERK OF ENTRY
OF JUDGMENT

Tripp & Callaway, Esqs.,
210 West 7th Street,
Los Angeles 14, Calif.

John W. Olson, Esq.,
639 South Spring Street,
Los Angeles 14, Calif.

Re: Byrne, v. Woodworkers Tool Works,
No. 9134-Y.

You are hereby notified that Judgment on Verdict
has been entered this day in the above-entitled case,
in Judgment Book No. 64, page 119.

Dated: Los Angeles, California, February 23,
1950.

EDMUND L. SMITH,
Clerk.

By C. A. SIMMONS,
Deputy Clerk. [90]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NON OBSTANTE
VEREDICTO OR FOR A NEW TRIAL

Comes Now the defendant, Woodworkers Tool Works, through its attorney of record and moves this Honorable Court for a judgment Non Obstante Veredicto, or in the alternative for a new trial in the above-entitled cause, for the following reasons:

1. The verdict was contrary to law in that the special damages awarded to plaintiff were in excess of those pleaded or proven.

2. The evidence was insufficient to justify the verdict of the jury in that there was no evidence of negligence on the part of this defendant.

3. It was error for the Court to:

(a) Fail to grant this defendant's motion for a judgment of nonsuit at the close of plaintiff's case;

(b) Instruct the jury that the doctrine of Res Ipsa Loquitur was applicable; [91]

4. For such other and further reasons as may be presented at the hearing on this motion.

The motion shall be heard upon the pleadings and papers, upon the minutes of the Court, and upon the Memorandum of Points and Authorities filed herewith.

Dated this 3rd day of March, 1950.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

To Plaintiff William J. Byrne, and to John W. Olson, His Attorney:

Please take notice that the undersigned will bring the above motion on for hearing before this court at the court room of Judge Leon R. Yankwich in the United States Courthouse in the City of Los Angeles on the 13th day of March, 1950, at 10 o'clock a.m., or as soon thereafter as counsel can be heard.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

Memorandum of Points and Authorities in Support
of Motion

I.

The verdict was contrary to law in that the special damages awarded the plaintiff were in excess of those pleaded or proven.

Plaintiff's complaint prayed for "medical expenses when the total has been ascertained". At no time did plaintiff amend his complaint to insert therein any particular amount of medical expenses claimed by him. In fact the only evidence of medical expenses incurred by plaintiff was the testimony of the plaintiff to the effect that his doctor's expenses "were about \$400.00." There was no other proof of this figure tendered and in fact it was never proven that this amount was the reasonable value of the purported medical services rendered.

As to earnings, plaintiff testified that after leaving the Selby Company he did not go to work again until about July 1, 1949, and that he lost approximately six month's earnings. However, it was proven that plaintiff had told Dr. Boyes that he had returned to work on May 1, 1949, and not July 1st. Plaintiff's total loss of earnings was at the most \$1024.00 if we accept plaintiff's testimony that he earned \$256.00 a month or about \$64.00 a week.

In recapitulation, therefore, plaintiff's special damages could not possibly be more than \$400.00 for medical expenses and \$1024.00 for loss of earnings, or a total of \$1424.00.

II.

The evidence was insufficient to justify the verdict and there was no evidence of negligence on the part of this defendant. [93]

There is no question but that defendant conclusively proved that it made between five and seven inspections of the Champion Panel Raiser Head before it was shipped. Plaintiff in nowise introduced any evidence showing or tending to show that the defendant had the duty to do anything more than inspect the castings. Though plaintiff did introduce evidence of various tests none of them was shown to be a feasible or reasonable test in this type of case, and in fact Mr. Cheney, the plaintiff's own expert, positively testified that the only reasonable tests or inspections in this type of case were visual inspection and X-ray, and it was at this point that the Court informed the jury that the X-ray

test was so expensive that it was not reasonable in the premises. It is submitted, therefore, that there was absolutely no evidence of negligence on the part of this defendant.

III.

Since plaintiff failed to prove negligence on the part of this defendant as already shown, it was error for the Court to fail to grant this defendant's Motion for a Judgment of Nonsuit at the close of the plaintiff's case.

IV.

It was error for the Court to instruct the jury that the doctrine of *Res Ipsa Loquitur* was applicable.

In support of its instruction on *Res Ipsa Loquitur* the Court cited the following cases:

Kalash vs. Los Angeles Ladder Co. 1, Cal. (2d), 229;

Dryden vs. Continental Baking Co. 11, Cal. (2d) 33;

Honea vs. City Dairy, Inc. 22 Cal. (2) 614;

Escola vs. Coca Cola Bottling Co. 24 Cal. (2d) 453;

Sheward vs. Virtue, 20 Cal. (2) 410;

O'Rourke vs. Day & Night Water Heater Co. Ltd. 31 Cal. App. (2d) 364. [94]

An analysis of these cases shows that the Dryden and Escola cases are the only cases relying on the doctrine of *Res Ipsa Loquitur*, and the analysis further shows that these two cases are distinguishable from the case at hand, for the reason that the

Dryden case is a food case, and the Escola case is a carbonated beverage case.

It must be further noted that in the Escola case, it was definitely proven that the bottle was in exactly the same condition when handled by the plaintiff as it was when shipped by the defendant. Furthermore, it cannot be too strogly urged that the decision in the Escola case drastically extended the prevailing rule in California and was intended to apply only in cases involving containers of carbonated beverages, therefore, the rule of this case should be limited to cases wherein the facts are closely similar to the facts of this case, and should not be extended to apply to cases having dissimilar facts and not involving carbonated beverages.

The following excerpts from the Honea case cited by the Court are peculiarly applicable to the facts of the instant case and should be determinative.

“While the dairy may have had a duty to make an examination of all bottles, whether newly purchased or returned by prior customers, it is not responsible for defects that cannot be found by a reasonable, practicable inspection.”

“In the present case there is no evidence that a feasible means of discovering the defect or flaw was available to this defendant.”

“In the Bruckel case the court said (102 N. Y. S. 398): ‘There is no proof that inspection or examination of the bottle would have made its defect known to the most careful vendor or even to an expert in his employ. It does not appear that either

one or the other could have ascertained the defect by any test short [95] of those made by the expert witness of the plaintiff. If the fact were otherwise, it was the duty of the plaintiff to give evidence thereof; and in the absence of all evidence the jury cannot grope in speculation for a test or assume that there was one.' "

"The limit of its duty was to provide against defects discernible upon reasonable inspection and to handle the bottles with reasonable care. There is not anything to show it failed of its duty in these respects. We cannot conjecture that it may have done so. The mere happening of the accident did not establish negligence, and that only was shown. The proof offered by plaintiff clearly failed to support the burden imposed upon him. As was said by the learned court below: 'Under the evidence the only reasonable inference that can be deducted is that the accident was due to a latent unsuspected defect. *McSorley v. Katz*, 53 Pa. Super 243.' There being causes apparent, other than those within defendant's control, to which the accident might with equal fairness be attributed, the doctrine of *res ipsa loquitur* does not apply. *Norris vs. Philadelphia Electric Co.* 334 Pa 161 (5A 2d. 114). The direction of a verdict for defendant was necessary.'" (Underscore ours.)

Conclusion

For the above reasons it is respectfully submitted that this defendant's Motion For Judgment Non

Obstante Veredicto be granted, or in the alternative that a new trial should be ordered.

Respectfully submitted,

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 3, 1950. [96]

[Title of District Court and Cause.]

MOTION TO AMEND VERDICT

(Affidavit of Foreman of Jury Attached)

Now Comes the plaintiff William J. Byrne in the above-entitled cause by John W. Olson, his attorney, and moves this Court to amend the verdict in the above-entitled cause so that it will read as follows:

“We the Jury in the above-entitled cause find in favor of the plaintiff, William J. Byrne and against the defendant Woodworkers Tool Works, a corporation, and fix plaintiff’s special damages at \$1,000.00 and fix plaintiff’s general damages at \$8,000.00.

“Dated: February 21, 1950.

“GEORGE F. CALDWELL,
“Foreman of the Jury.” [98]

In support of this motion plaintiff attaches hereto the affidavit of George F. Caldwell, Foreman of the Jury.

“If a verdict is informal, but otherwise sufficient, in that it is responsible to all the issues the Court may enter it in proper form.”

CyClopedia of Federal Procedure 2nd Edition, Volume 8, Page 18 in Cases Cited.

“The Court may amend a verdict in respect of defects which are formal and have no connection with the merits of the cause, where the amendment in no respects changes the rights of the parties.”

24 Cal. Jurisprudence at Page 892 and Cases Cited.

/s/ JOHN W. OLSON,

Attorney for Plaintiff. [98-A]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE CALDWELL,
FOREMAN OF THE JURY

State of California,
County of Los Angeles—ss.

George Caldwell being thus duly sworn deposes and says:

That I was foreman of the Jury in the trial of the above-entitled action, which brought in a verdict for plaintiff and against the defendant for the total

sum of \$9,000.00 on February 21, 1950; that fifteen (15) minutes after said verdict was returned and the jury was discharged, I learned that an error was made in filling in the amount awarded as special damages and the amount awarded as general damages; that it was my function as foreman to perform the clerical work of filling in said respective amounts on the form of verdict supplied therefor, and to sign the verdict of the jury as its foreman; that the jury arrived at its verdict within a period of ten minutes of the time when we were to [99] again report to the Court on the progress of our deliberations and that verdict unanimously arrived at was for \$8,000.00 as general damages and \$1,000.00 as special damages. That in Proceeding to write down and sign that verdict, I learned after it return that in the haste caused by the limited time, we had to return it to the Court. I made the clerical error of writing the sum of \$8,000.00 opposite the printed words "Special Damages" and \$1,000.00 opposite the printed words "General Damages," whereas it was intended that as aforesaid that \$8,000.00 should have been written opposite the printed words "General Damages" and \$1,000.00 opposite the printed words "Special Damages" and this all Jurors will verify.

/s/ GEORGE CALDWELL,
Foreman of the Jury.

Subscribed and sworn to before me this 9th day
March 1950.

[Seal] [Indistinguishable.]

Notary Public in and for the County of Los An-
geles, State of California.

Receipt of copy attached.

Filed March 9, 1950. [100]

United States District Court, Southern District of
California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corporation,
Defendant.

AMENDED JUDGMENT ON VERDICT

The above-entitled cause was tried before the Court and a duly-impanelled jury, on February 16, 17, 20, 21, 1950; and oral and documentary testimony was admitted in evidence; John W. Olson, Esq., appeared as counsel for plaintiff; and Hulen C. Callaway, Esq., and F. V. Lopardo, Esq., appeared as counsel for defendant.

On February 20, 1950, said cause was submitted to the jury; which presented its verdict February

21, 1950, after deliberation. On order of the Court, the jury was polled and each member thereof stated that the verdict as presented and read was his verdict. Whereupon, the Court ordered that said verdict be filed and entered, said verdict being as follows:

“United States District Court, Southern District of
California, Central Division [103]

“No. 9134-Y Civil

“WILLIAM J. BYRNE,

“Plaintiff,

“vs.

“WOODWORKERS TOOL WORKS, a corporation,
tion,

“Defendant.

“VERDICT

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff's special damages at Eight Thousand Dollars, and fix plaintiff's general damages at One Thousand Dollars.

“Dated: February 21st, 1950.

“GEO. F. CALDWELL,
Foreman of the Jury.”

On motion of plaintiff and after hearing held on March 13, 1950, it appeared to the Court that upon the face of the verdict and upon the affidavit of the

foreman of the jury filed herein that clerical error was made in said verdict in that said foreman inserted the sum of Eight Thousand Dollars (\$8,000) after special damages, instead of One Thousand Dollars (\$1,000) after special damages; and inserted the sum of One Thousand Dollars (\$1,000) after General Damages instead of Eight Thousand Dollars (\$8,000). It is hereby ordered that said verdict is hereby amended to show the sum of One Thousand Dollars (\$1,000) as special damages and Eight Thousand Dollars (\$8,000) as general damages.

Now, therefore, by virtue of the law and by reason of the aforesaid premises,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiff, William J. Byrne, do have and recover of and from the defendant, Woodworkers Tool Works, a corporation, the sum of Nine Thousand Dollars (\$9,000.00), together [104] with costs taxed at \$78.00.

Dated: Los Angeles, California, March 16, 1950.

/s/ LEON R. YANKWICH,
Judge.

Approved as to form:

TRIPP & CALLAWAY,
Attorneys for Defendant.

Receipt of Copy attached.

[Endorsed]: Filed and entered March 16, 1950. [105]

[Title of Court.]

NOTICE BY CLERK OF ENTRY OF
JUDGMENT

Tripp & Callaway,
210 West 7th St.,
Los Angeles 14, Calif.

John W. Olson,
639 South Spring St.,
Los Angeles 14, Calif.

Re: Byrne, v. Woodworkers Tool Works, No.
9134-Y.

You are hereby notified that Amended Judgment on Verdict has been entered this day in the above-entitled case, in Judgment Book No. 64, page 474.

Dated: Los Angeles, California, March 16, 1950.

EDMUND L. SMITH,
Clerk,

By C. A. SIMMONS,
Deputy Clerk. [107]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, the defendant Woodworkers Tool Works, a corporation, has filed, or is about to file, a notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse or modify the judgment entered by the District Court of United States for the Southern District of California in the above-entitled cause on February 23, 1950, and the amended judgment on verdict entered March 16, 1950, and to supersede said judgment and amended judgment; and

Whereas, the said defendant is required to give an undertaking, under seal, in the sum of \$9,963.46, conditioned for the satisfaction of the judgment or the amended judgment in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or amended judgment are affirmed, and to satisfy in full any modification of the judgment or amended judgment and such costs, interest, and damages as the appellate court may adjudge and award. [108]

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Globe Indemnity Company, a corporation organized and existing under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant that said Appellant will comply with the conditions as above

set forth, and does further agree that, upon default by the said Appellant in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this court shall direct; that this court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

In Witness Whereof, the said Globe Indemnity Company, has caused these presents to be executed and its official seal attached by its duly authorized attorney-in-fact at Los Angeles, California, this 22nd day of March, 1950.

GLOBE INDEMNITY
COMPANY,

[Seal] By /s/ R. N. OTTENSON,
Attorney-in-Fact.

The premium charged for this bond is \$199.27 per annum.

State of California,
County of Los Angeles—ss.

On this 22nd day of March in the year 1950, before me, L. Hollingshead, a Notary Public in and for the County and State aforesaid, personally appeared R. N. Ottenson known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact

of Globe Indemnity Company and acknowledged to me that he subscribed the name of the said Company thereto as principal, and his own name as Attorney-in-Fact.

/s/ L. HOLLINGSHEAD,

Notary Public in and for Said
County and State.

My Commission expires May 14, 1952.

Examined and recommended for approval as provided in Rule 8.

/s/ JOHN W. OLSON,

Attorney.

I hereby approve the foregoing.

Dated this 23rd day of March, 1950.

/s/ LEON R. YANKWICH,

Judge.

[Endorsed]: Filed March 23, 1950. [110]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Woodworkers Tool Works, a corporation, hereby appeals to the Court of Appeals for the Ninth Circuit from:

1. The order entered March 21, 1949, denying this defendant's motion to dismiss the action, or in lieu thereof to quash the return of service of summons;

2. The Final Judgment on Verdict entered on February 23, 1950, in Judgment Book No. 64, page 119;

3. The Amended Final Judgment on Verdict entered on March 16, 1950, in Judgment Book No. 64, page 474.

Dated: April 10, 1950.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 10, 1950. [111]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now the appellant, Woodworkers Tool Works, a corporation and designates for inclusion the complete record and all the proceedings and evidence in the above-entitled action including:

1. Summons and Amended Complaint for Personal Injuries;
2. Notice of Motion to Dismiss Action and Quash the Return of Service of Summons;
3. Affidavit of E. H. Preuer dated February 25, 1949, in Support of Motion to Dismiss Action and Quash the Return of Service of Summons;
4. Affidavit of Robert E. Dunne dated February 25, 1949, in Support of Motion to Dismiss Action and Quash the Return of Service and Summons;
5. Affidavit of William R. Walker dated March 15, 1949;
6. Affidavit of Ray Taylor dated March 15, 1949, and [113] attached invoice;
7. Second Amended Complaint for Personal Injuries (verified April 4, 1949); and Summons;
8. Ruling on Defendant's Motion to Dismiss Action and Quash Return of Service and Summons (Minute Order of March 21, 1949);
9. Motion to Dismiss First Count or Cause of Action of the Second Amended Complaint and for a more Definite Statement, (verified April 30, 1949);
10. Notice of Motion to Dismiss First Count or Cause of Action of the Second Amended Complaint

and for a more Definite Statement (dated April 30, 1949) ;

11. The Court's Decision on Defendant's Motion to Dismiss First Count or Cause of Action of the Second Amended Complaint and for a more Definite Statement ;

12. Stipulation to Take Deposition of Witness ;

13. Defendant's Requested Jury Instructions ;

14. Plaintiff's Requested Jury Instructions ;

15. Verdict of The Jury ;

16. Judgment on Verdict ;

17. Notice of Clerk of Entry of Judgment on February 23, 1950 ;

18. Motion by Plaintiff To Amend Verdict (dated February 21, 1950) ;

19. Affidavit of Foreman of the Jury in Support of Motion to Amend Verdict (dated March 9, 1950) ;

20. Motion by Defendant for Judgment Non Obstante Veredicto or for a New Trial (dated March 3, 1950) ;

21. The Court's Ruling on Defendant's Motion for New Trial ;

22. The Court's Ruling on Plaintiff's Motion to Amend Verdict ; [114]

23. Amended Verdict ;

24. Amended Judgment on Verdict ;

25. Notice of Entry of Amended Judgment on Verdict on March 16, 1950 ;

26. All Stenographic Transcripts of the following proceedings :

(a) Hearing on Defendant's Motion to Dismiss Action and Quash the Return of Service and Summons;

(b) Trial of the Cause and all proceedings in connection therewith;

(c) Hearing on Defendant's Motion for New Trial and on Plaintiff's Motion to Amend Verdict;

27. Defendant's Supersedeas Bond (dated March 23, 1950);

28. Notice of Appeal (dated April 10, 1950);

29. Designation of Record on Appeal;

30. Any Designation of Additional Matter filed by Appellee.

Dated this 21st day of April, 1950.

Respectfully submitted,

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 21, 1950. [115]

In the United States District Court, Southern
District of California, Central Division

No. 9134-Y

Honorable Leon R. Yankwich, Judge Presiding

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

JOHN W. OLSON, Esq.,

639 South Spring Street, Room 904,
Los Angeles, California.

For the Defendant:

TRIPP & CALLAWAY, by

HULEN C. CALLAWAY, Esq., and

FIORENZO V. LOPARDO, Esq.

935 Van Nuys Building,
210 West 7th Street,

Los Angeles, California. [11*]

* Page numbering appearing at top of page of original
Reporter's Transcript.

Thursday, February 16, 1950

(A jury was duly empaneled.)

(Opening statement on behalf of the plaintiff.)

(Opening statement on behalf of the defendant.)

The Court: Ladies and gentlemen of the jury, we will take a short recess at this time.

The court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial or to form or express an opinion thereon until the cause is finally submitted to you.

(Short recess taken.)

The Court: Let the record show the jury is in the box. Proceed. Call your first witness.

Mr. Olson: Mr. George Selby.

GEORGE SELBY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: George Selby.

Direct Examination

By Mr. Olson:

Q. Mr. Sleby, in answering my questions and the questions Mr. Callaway puts to you, raise your

(Testimony of George Selby.)

voice, will you, [12] so that the jury can hear you.

A. Yes, sir.

Q. What is your business or occupation, Mr. Selby?

A. We are manufacturers of sash and doors.

Q. Do you own the business? A. I do.

Q. Did you own the business in the month of October of 1946? A. Yes, sir.

Q. Where is that business located?

A. In Burbank.

Q. Can you give us the address?

A. 1101 West Victory Boulevard.

Q. Did you in the month of October and prior thereto have in your employ a man by the name of William J. Byrne? A. Yes, sir.

Q. Do you know when he was first employed by you?

A. I don't recall offhand. I could determine that from my records.

Q. Can you give us an approximation?

A. As I remember, about 30 days prior to the time he was injured.

Q. Do you know in what capacity Mr. Byrne was employed?

A. He was operating a shaper.

Q. You are getting a little ahead of me. In other words, [13] when Mr. Byrne was hired, what was he hired for?

A. As I recall, the union contract classifies each type of man in the mill as a certain type of oper-

(Testimony of George Selby.)

ator. Mr. Byrne was hired to operate a shaper.

Q. I see. Do you know what Mr. Byrne's wages were on or about October 28, 1948?

A. I made notes on that, if I may refer to them.

Q. You personally made those notes?

A. Yes.

Q. You may refresh your memory. I might ask you, for the record, from what source were those notes made?

A. They were taken from our employment records in our office.

Q. When did you make your notes?

A. Yesterday.

Q. Will you tell what they disclose?

A. Yes. He was hired—the technical term is a joiner, and the rate is \$1.60½ per hour.

Q. He was making \$1.60½ per hour?

A. Yes.

Q. Do you have a record of how much he worked, how many hours per day he worked?

A. The regular work day is eight hours.

Q. What are the hours?

A. At that time, I believe, we commenced at 8:00 o'clock [14] in the morning and took a half hour at noon, and closed at 4:30.

Q. Then Mr. Byrne would work eight hours a day, approximately? A. That is correct.

Q. To your knowledge was he working steadily up to the time of the accident, after he was hired?

A. He was.

(Testimony of George Selby.)

Q. How many days a week did you work?

A. Five days was the normal work week.

Q. Did you have any weeks where your work week consisted of more than five days?

A. There were times when we worked on Saturday mornings, which was overtime.

Q. I see. Did you on or before October 28, 1948, purchase what we designate as a panel raiser head from the Woodworkers Tool Works?

Mr. Callaway: Just a moment. I object to that as leading and suggestive.

The Court: Read the question.

(The question was read.)

The Court: Overruled.

Q. (By Mr. Olson): Answer the question.

A. We did get—we did buy a panel raiser head from the firm in Chicago that you describe. [15]

Q. Was it delivered to you from the firm in Chicago, the Woodworkers Tool Works?

A. Yes, sir.

Q. Do you know what date it was delivered to you?

A. It was delivered to us on the 25th of October, in 1948.

Q. Do you have any record of how it was delivered to you? That is, was it by train, automobile, personal messenger?

A. It was delivered by air express.

Q. Direct from the Woodworkers Tool Works to you?

A. Yes, sir.

(Testimony of George Selby.)

The Court: Could you give us the date?

The Witness: Yes.

Mr. Olson: Yes. October 23, 1948.

The Witness: No. October 25th.

Mr. Olson: 25th. Excuse me.

Q. (By Mr. Olson): Did you give us the time that it was delivered to you? A. No, sir.

Q. Did you see the panel raiser head when it was delivered or the container, or if it was in a container, the container in which it was deposited when it was delivered? A. No, sir.

Q. Who ordered this panel head? [16]

A. Mr. Walker, our plant superintendent.

Q. Do you know, to your own personal knowledge, what was done with the panel raiser head when it was delivered to you by the Woodworkers Tool Works? That question can be answered yes or no. A. No, sir.

Q. When you have machine tools delivered to you, where are they usually placed, in whose custody are they usually given?

A. Any equipment of that kind that would be delivered to us would be sent immediately to the tool crib.

Q. Do you know who is in charge of the tool crib?

A. A man by the name of Chirby was in charge at that time.

Q. Is he in charge at the present time?

A. Yes, he is.

(Testimony of George Selby.)

Q. Do you employ Mr. Chirby?

A. No, sir.

Q. Who does?

A. Our landlord, General Panel Corporation.

Q. Do you have an arrangement with the General Panel Corporation whereby you use Mr. Chirby's tool shed and his services?

A. Our lease with General Panel requires that they have complete supervision of all machines. And Mr. Chirby—— [17]

Q. That you use?

A. Yes, sir; whether they are our machines or their machines.

Q. Do you know, of your own personal knowledge, what Mr. Chirby's job is with General Panel?

A. He is in charge of maintaining, servicing and installing all their equipment.

Q. Does he install all of your equipment?

A. Yes, sir.

Q. Does anybody else install equipment for you?

A. Only under his direction.

Q. Are you aware of the fact that there was an accident occurred on or near your plant on October 28, 1948?

A. Are you referring to the accident in which Mr. Byrne was hurt?

Q. Yes. Are you aware it happened?

A. I was aware of it a few minutes after it happened, yes, sir.

Q. How were you apprised of the fact an accident had occurred?

(Testimony of George Selby.)

A. I don't recall who told me, but someone told me orally he had been hurt.

Q. Upon your being told that Mr. Byrne had been hurt, what did you do? Did you go to the scene of the accident?

A. I did, about 30 minutes later. The first thing we [18] did was see to it that he got to a doctor immediately.

Q. Did you see to it?

A. I ordered—I instructed my brother to see to it, and he took care of it.

Q. Who is your brother? What is his name?

A. His name is James Selby.

Q. What is his job, if any, in your company?

A. He is the manager of the company.

Q. To your knowledge did your brother James Selby take Mr. Byrne to a doctor immediately?

A. I don't know that he took him. He was taken to a doctor.

Q. Do you know who took him?

A. No, sir.

Q. Did you ever see the panel raiser head after the accident? A. Yes.

Q. Where did you see it?

A. I instructed Mr. Walker to bring it to me immediately.

Q. Who is Mr. Walker?

A. Our plant superintendent.

Q. Is he working with you now?

A. No, sir.

(Testimony of George Selby.)

Q. Did Mr. Walker bring it to you immediately?

A. Yes. [19]

Q. Did he bring it to you in one piece?

A. There were two pieces.

Q. What, if anything, did you do with the part after it was brought to you?

A. I put it in our safe.

Q. Personally? A. Yes, sir.

Q. Both pieces? A. Both pieces.

Q. How long did it remain in your safe?

A. Probably for several months. I don't recall for sure.

Q. When was it first taken out of your safe, if at all?

A. It was taken out at the request of a gentleman who represented the insurance company that carried the liability insurance for the tool company in Chicago, from whom we purchased the head.

Q. Did you give them the head?

A. Yes, sir.

Q. How long did they keep it, to your knowledge? A. As I remember, about a week.

Q. It was then returned to you?

A. Yes.

Q. What did you do with it?

A. I put it back in the safe where I kept it before. [20]

Q. Were two pieces returned to you?

A. Yes, sir.

Q. Was it ever let out of your safe after that?

(Testimony of George Selby.)

A. Yes, sir.

Q. Explain the circumstances of that happening.

A. It was given to you when you asked for it.

That was the only other time.

Q. Have you seen it since? A. Yes, sir.

Q. When? A. I saw it yesterday.

Q. But that is the first time you have seen it since the time you first gave it to me some months ago? A. Yes, sir.

Q. Let me ask you this, Mr. Selby: Do I understand your testimony to be that from the time immediately after the accident or soon thereafter the part was brought to you directly? A. Yes, sir.

Q. And that you placed it in a safe?

A. Yes.

Q. And that nobody else has seen or had possession of that part with the exception of one agent of an insurance company you mentioned and myself, to your knowledge? A. That is correct. [21]

Q. You testified you saw the part after the accident? A. Yes, sir.

Q. You examined it? A. Yes, sir.

Q. Do you know, to your personal knowledge, what wood Mr Byrne was working with at the time of the accident? A. Yes, sir.

Q. How do you happen to know that?

A. We only use one type of wood in our manufacturing.

Q. What were you manufacturing at that time?

A. We only used one type of wood in our manufacturing.

(Testimony of George Selby.)

Q. What were you manufacturing at that time?

A. Doors and windows.

Q. Do you know what Mr. Byrne was working on at the time of the accident?

A. Yes, sir, he was raising panels for the manufacture of doors.

Q. Can you describe to the jury and the court as simply as possible what you mean by raising panels?

A. Well, the term "raising" means to bevel the edges on a panel of wood that goes into the door. It is beveled on all four sides.

Q. I don't recall whether you answered this question before or not: What kind of wood was Mr. Byrne working on at the time of the accident? [22]

A. White pine.

Q. Is that wood soft or hard?

A. It is very soft.

Q. What was to be its purpose?

A. I don't understand the question.

Q. It was being made into a door, did I understand you to say?

A. It was being made into a panel to put into a door.

Q. Do you have a sample of that exact wood that was being used by Mr. Byrne at the time of the accident? A. Yes.

Q. How do you happen to have it?

A. We have a lot of samples.

Q. I am trying to establish how you know that

(Testimony of George Selby.)

the sample you have is of the same lot as the wood, exact wood Mr. Byrne was using at the time of the accident?

A. That particular lot of panels that we were running was for a carved door we sold in the east. They were of a particular style, and that is the only one we sold.

Q. You had some left over?

A. We always make an overrun of from 5 to 12 per cent. We still have all the overrun we had at that time.

Q. You know definitely, of your own personal knowledge, you have a piece of that wood, and that that is the wood from the same exact lot Mr. Byrne was working on at the time of the [23] accident in 1948?

A. Yes, sir.

Q. I will ask you, Mr. Selby, if this is the type of wood and the shape of wood Mr. Byrne was working on at the time of the accident?

A. It is.

Q. And it is soft pine?

A. Yes, sir.

Q. So that the jury may understand, will you describe what Mr. Byrne was doing—is this the finished piece of wood (indicating)?

A. Yes.

Q. In other words, Mr. Byrne was doing to wood what this has had done to it?

A. That is right.

Q. Will you describe what that is to the jury?

A. This is one of four panels, two long ones

(Testimony of George Selby.)

and two shorter ones; be about half the length of this that go into the door.

The outer portion is called the stiles and the top and bottom are called the rails. These are the panels that go into a raised panel door. The reason we call it raised is the edges have been beveled on all four sides.

Q. What bevels them?

A. The panel raiser head. [24]

Q. Could you explain as simply as possible how that is done? In other words, is it beveled on both sides?

A. Yes, sir. It is beveled on both sides. That is the reason we bought the head. Without the head we would have to bevel just one side at a time. With the head, with the panel raiser head that broke—it was made in two pieces or two sections, and it would bevel both sides at the same time and cut our labor costs in two.

Q. If I don't interpret you correctly, you tell me. As I understand it, this piece of wood, lumber, is placed on a table and run through the cutter and the cutter cuts this, and this at the same time (indicating)?

A. Both sides at the same time.

Q. Could you tell us what cut that is, what size cut? Would you consider that a large or small cut?

A. That is a question I wouldn't—

Q. You are not qualified?

A. It is just an ordinary cut.

(Testimony of George Selby.)

Q. Did you ever pay for the panel raiser head in question here?

A. I don't think so. I am sure we didn't.

Mr. Olson: I would like at this time to offer this piece of wood in evidence.

The Court: It may be received.

Mr. Olson: I would like the jury to look at it. [25]

The Court: The jury can examine it when you are through with the witness. They can look at it from where it is.

The Clerk: Plaintiff's Exhibit 1 in evidence.

(The article referred to was marked Plaintiff's Exhibit 1, and was received in evidence.)

Q. (By Mr. Olson): Where was this wood purchased, Mr. Selby?

A. I don't know; we bought wood from a good many different firms.

Q. You are unable to tell at this time exactly where this particular piece of wood was purchased?

A. Even then I couldn't have told.

Q. I see. A. I don't know.

Mr. Olson: Your Honor, I have a few more questions to ask this witness but I didn't know we would move this quickly. Br. Byrne is getting something for me. Mr. Callaway will stipulate I can take Mr. Selby back on direct, after he is through with cross-examination.

The Court: All right.

(Testimony of George Selby.)

Cross-Examination

By Mr. Callaway:

Q. Mr. Selby, do you know Mr. Townsend who sits here in the court room (indicating)?

A. Yes, sir. [26]

Q. He is with the Woodworkers Supply Company of Los Angeles, is that not true?

A. Yes, sir.

Q. He is the man from whom you purchased the raiser head in question?

Mr. Olson: I object to that question as being immaterial. It has nothing to do with the case.

The Court: It is preliminary to something, I don't know what.

You may answer.

The Witness: We didn't purchase it from any man. We purchased it——

Q. (By Mr. Callaway): You called him and gave the order for it, didn't you?

A. I didn't myself, no, sir.

Q. Who in your organization actually placed the order?

A. I imagine my brother placed the order. We file purchase orders for everything we buy.

Q. Do you have that purchase order?

A. No, sir.

Q. Is it available to you?

A. It would be in our records, yes, sir.

Q. Would you have an opportunity to get it over the noon hour?

(Testimony of George Selby.)

Mr. Olson: I object to these questions on the ground [27] they are all immaterial.

The Court: I do not see the materiality of the purchase order at the present time.

Mr. Callaway: I will proceed to develop it.

Q. (By Mr. Callaway): You got a bill from the Woodworkers Supply Company of Los Angeles for this raiser head, did you not?

Mr. Olson: Same objection.

The Court: Overruled. Go ahead.

The Witness: Yes, sir.

Q. (By Mr. Callaway:) And you didn't get any bill from the Woodworkers Tool Works of Chicago?

Mr. Olson: Same objection.

The Court: I will allow that.

Mr. Olson: Your Honor, may I point out that this is nothing but an attempt to bring up an issue that has already been settled by this court, bringing up a jurisdictional question.

The Court: That is all right. The relationship between the parties may be shown. The legal effect will be determined by the court.

Mr. Callaway: Certainly.

Mr. Olson: The legal effect has already been determined by the court and a record made.

The Court: There is no harm in showing the purchase was [28] not direct from the defendant. I will instruct the jury as to the theory of liability.

Mr. Olson: I don't want to maintain this argu-

(Testimony of George Selby.)

ment, your Honor, but the purpose of this is not for the purpose of defending this suit. The purpose is for reopening the question of jurisdiction, for the purpose of an appeal if necessary. I say the record has been made.

The Court: I can guess objects as fast as you can.

Mr. Olson: Yes, your Honor.

The Court: If I discern any attempt to becloud the issue, I will stop counsel before you even object.

Mr. Olson: I understand that. I don't want any question of jurisdiction in this trial. The record has been made.

The Court: There is no question of jurisdiction being raised at the present time. The mere fact that other parties are not before the court does not change the jurisdiction of this court.

Mr. Callaway: I understand that.

The Court: No demand has been made that anybody be joined, which would destroy jurisdiction. If demand were made under the Code, if the bringing in of a new party would affect the court's jurisdiction, I have a right to deny it. Let us go on.

Mr. Callaway: May the question be head?

(The question was read.) [29]

The Witness: We got a manifest from the tool company in Chicago.

Q. (By Mr. Callaway): I didn't ask you that. I asked if you got a bill.

(Testimony of George Selby.)

A. What do you mean by "bill," sir?

Q. A bill billing you for this particular raiser head.

A. We did not.

Q. By manifest do you mean a shipping document?

A. Yes, sir.

Q. Now, what is the difference between a shaper and a joiner?

A. I don't know, sir.

Q. Well, is there any?

A. I don't know that there is.

Q. All right. Was this the only raiser head that you had in your plant of this type, where it could cut both edges at the same time?

A. Yes, sir.

Q. Do you know who installed it, of your own personal knowledge?

A. I didn't hear that.

Q. Do you know who installed this particular raiser head, of your own personal knowledge?

A. I know who I was told installed it. I didn't see them. [30]

Q. If you don't know, all right. Did you ever see it in operation before Mr. Byrne's accident?

A. No, sir.

The Court: Was your answer that you did not see it installed?

The Witness: No, sir, I did not.

The Court: Who installed it?

The Witness: Mr. Chirby, the gentleman who was in charge of servicing all the equipment for our landlord. He installed it.

The Court: For your landlord?

The Witness: Yes, sir.

(Testimony of George Selby.)

The Court: It was no one connected with the defedant, the Woodworkers Tool Works?

The Witness: No, sir.

Mr. Callaway: I think that is all.

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Selby, you testified that you saw the part immediately after the accident, is that ocrrect?

A. Yes, sir.

Q. You did not see this part before it broke, is that correct (indicating)? A. No, sir.

Q. You said the part was in two parts when you saw it? [31] A. Yes.

Q. Am I correct, then, Mr. Selby, that you did not see this part——

A. When I said two parts, I meant that I saw this part and the part that had broken off.

Q. Had this part broken off, too?

A. I can tell.

Q. It is broken off here (indicating).

A. Yes. These are the parts.

Q. There are two parts and the main head, is that correct? That is, when you saw it?

A. There are two sections, yes.

Q. In other words, let me put it this way: When the part was brought to you immediately after the accident, is that substantially what it looked like?

A. Yes, sir.

(Testimony of George Selby.)

Q. That is what you put into your safe?

A. That is correct.

Mr. Olson: I want to offer this as Plaintiff's next in order. However, I do that with an explanation. There are two detachable parts from this main head, both of which the plaintiff will prove were broken off when the part disintegrated. However, we must explain these two parts which, if you are mechanical enough, you can put together and they will fit on to the actual breaking off of the safety and from which [32] cuts were made by experts who tested this metal. These two smaller parts were still somewhere, which the expert will testify to. He had to cut these two to make the analysis.

I will offer the four parts and the panel raiser head in evidence as Plaintiff's next in order.

The Court: They may be received.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The articles referred to were marked Plaintiff's Exhibit 2, and were recieved in evidence.)

Q. (By Mr. Olson): While you are on the stand and so the jury may have a clear conception of this, is it my understanding—of course, this part is broken and we can't make an exact demonstration—but generally speaking, these are the cutters and the wood goes in between the cutters and makes those grooves you testified to, is that correct (indicating)?

(Testimony of George Selby.)

A. It makes a beveled edge.

Q. It is placed upon your—what is the name of that panel——

A. Joiner.

Mr. Byrne: Joiner.

Mr. Olson: What is the spindle on?

Mr. Byrne: A machine.

The Court: What is the name of the machine?

Mr. Bryne: Oliver joiner. [33]

Mr. Olson: Shaper, I understand. It is the same thing. This is put on the shaper and it rotates, and the wood is put in between it to bevel the sides.

Q. (By Mr. Olson): I might ask you this: Was this tag on that part when it was brought to you, to your knowledge (indicating)?

A. I don't remember.

Mr. Olson: So that the jury won't be confused, Mr. Callaway, can we agree a shaper and a joiner are the same thing?

Mr. Callaway: I don't know. That is what I am trying to find out.

Mr. Olson: I will have to find out.

Q. (By Mr. Olson: Do I understand you now that when the part was brought to you this was off (indicating)? These two pieces, we understand, they were still there (indicating). This was off, is that correct (indicating)?

A. Yes, sir.

Q. Now, I ask you if this then was substantially the shape you found it in when it was first delivered to you? I think your attention should be called to this fact: Were these drill holes in it (indicating)?

(Testimony of George Selby.)

A. No, sir.

Q. In other words, your testimony now is that is in substantially the same form, but these two holes on the lower [34] arm and the three holes on the upper arm were not there?

A. They were not.

Q. Was this hole in there (indicating)?

A. I don't remember.

Q. You don't remember? A. No, sir.

Mr. Olson: I offer these as Plaintiff's Exhibits 2, 2-A, -B and -C, and -D.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 2, 2-A, 2-B, 2-C and 2-D in evidence.

(The articles referred to were marked Plaintiff's Exhibits 2, 2-A, 2-B, 2-C and 2-D, and were received in evidence.)

Q. (By Mr. Olson): Did Mr. Byrne continue to work for you after the accident?

A. No, sir.

Q. How long was he away from your plant?

A. After the accident?

Q. Yes.

A. He never came back to work for us.

Q. Didn't he come back at one time for a short period of time?

A. I don't recall, if he did. He may have.

Mr. Olson: I think that is all. [35]

Mr. Callaway: I have no questions.

The Court: All right. Step down.

(Witness excused.)

Mr. Olson: Again, I am in trouble, your Honor. I didn't know we would move this fast with the jury.

The Court: You should learn that.

Mr. Olson: I haven't been before your Honor before in this kind of cases. My next in proof is not here. What time would you convene after the lunch hour?

The Court: 1:30.

Mr. Olson: He will be here at 1:30, but he is not here now.

The Court: All right. Ladies and gentlemen of the jury, we are about to take an adjournment to 1:30.

The court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial, or form or express an opinion thereon until the cause is finally submitted to you.

When you return, go to the jury room, and you will be called. I do not want you to stand in the hallways. There may be people connected with the case in the hallways talking, and you are not supposed to overhear any of the conversations about the case.

(Thereupon, at 12:10 o'clock p.m. a recess was taken until 1:30 o'clock p.m. of the same day.) [36]

Los Angeles, California, Thursday, February
16, 1950, 1:40 P.M.

The Court: Let the record show the jury is in the box.

Mr. Olson: I ask leave to recall Mr. George Selby to the stand for two more questions if that is all right.

The Court: All right.

GEORGE SELBY

recalled as a witness on behalf of the plaintiff, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Selby, since you were on the stand this morning, have you had occasion to check the records of your office regarding Mr. Byrne's employment?

A. I called my office and had them read the information on the employment record.

Q. Who read it?

A. The girl by the name of Mary Bailey, who is in charge of our employment files.

Q. Did you talk to anyone else besides Miss Bailey? A. No, sir.

Q. You didn't talk to your brother?

A. Not about the files.

Q. Did you make notes from what information was given [37] you by Miss Bailey?

A. Yes, sir.

(Testimony of George Selby.)

Q. That information was read to you over the phone by Miss Bailey, from your office records?

A. That is correct.

Q. Does your information, after you have made this investigation, show that Mr. Byrne was re-employed by your company after the accident?

A. Yes, sir.

Q. Your records show when he was reemployed?

A. Yes, sir. On the 10th of January, 1949.

Q. Do they show how long he worked after the 10th of January, 1949?

A. Yes, sir. Until the 1st of February, 1949.

Q. Do they show then that he no longer worked for you? A. That is correct.

Q. Does your record show whether he quit or was discharged or laid off, or what happened?

A. The record shows his employment was terminated because of unsatisfactory service.

Q. What do you mean by "unsatisfactory service" on those records?

Mr. Callaway: The record will speak for itself, if the court please.

The Court: Overruled. Go ahead. [38]

Q. (By Mr. Olson): Answer the question.

A. The term "unsatisfactory service" in this case means that he was not able to perform his work satisfactorily, in compliance with our standards.

Q. Do your records have any indication, or do you know, of your own personal knowledge, whether Mr. Byrne's work was satisfactory before the accident? A. It was satisfactory, yes, sir.

(Testimony of George Selby.)

Q. One more question or two. I neglected to ask you, Mr. Selby, when I showed you Plaintiff's Exhibit 2, being the panel raiser head, whether at the time you saw that raiser head after the accident you observed the hole in the upper cut or the one that broke. A. I did observe it, yes, sir.

Q. Was that hole or blow-hole or void which you see here (indicating) exactly the same hole or void or blow-hole you saw immediately after the accident in this device? A. Yes, sir.

Q. Same size, shape and depth? A. Yes.

Q. To the best of your knowledge?

A. Yes.

Q. Then again the only difference in this panel raiser head, as you see it now, as distinguished from when you saw it immediately after the accident, is the holes drilled in the [39] upper and the lower arms for analysis?

A. The only hole I saw is the bubble in there now.

Cross-Examination

By Mr. Callaway:

Q. Mr. Selby, on Mr. Byrne's return to work for you in January, he returned to work as a helper, did he not?

A. His rate was the same, and I imagine that his classification was the same as it had been before.

Q. Well, he returned to work there as a helper?

A. Well, all I can tell you, sir, is that the rate was the same.

(Testimony of George Selby.)

Q. You don't know whether his work was satisfactory or unsatisfactory, of your own personal knowledge, do you?

A. No, sir. I only stated what was shown on our employment records.

Mr. Callaway: Well, I move to strike out the witness' testimony as being hearsay on the subject of whether or not the plaintiff's work, when he returned in January of 1949, was satisfactory or unsatisfactory.

The Court: You are not called upon to express any judgment yourself; you are merely going by what your employment cards would show?

The Witness: By what the records show, that is correct.

The Court: You did not make the notation, did you? [40]

The Witness: No, sir.

The Court: The motion will be granted. The jury is instructed to disregard the statement that the plaintiff's work was unsatisfactory.

Q. (By Mr. Callaway): During the period of, I believe, one month, when Mr. Byrne had worked there before he had his accident, he was employed as a joiner? A. Yes, sir.

Mr. Callaway: That is all.

Mr. Olson: That is all.

The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Olson: May this witness be excused, Mr. Callaway?

Mr. Callaway: So far as I am concerned.

Mr. Olson: I will call Mr. Chirby to the stand.

MICHAEL L. CHIRBY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Michael L. Chirby.

Direct-Examination

By Mr. Olson:

Q. Mr. Chirby, will you keep your voice up? It is hard [41] to hear in here and we want the jury and the court and everyone to hear you.

A. Yes, sir.

Q. Please keep that in mind.

A. Yes, sir.

Q. Mr. Chirby, what is your occupation?

A. My occupation there at this time is knife grinder and saw filer at General Panel Corporation.

Q. Were you employed by General Panel Corporation in October of 1948? A. Yes, sir.

Q. In what capacity. A. Same capacity.

Q. Among your duties, was it your duty to install cutting devices upon machines?

A. Yes, sir.

(Testimony of Michael L. Chirby.)

Q. Did you install cutting devices for the Selby Company as well as for the company for which you were working? A. Yes, sir.

Q. To your knowledge did anyone in October of 1948 install cutting devices for Selby Company, other than yourself?

A. No, sir, not to my knowledge.

Q. In other words, I understand your testimony to be that it was your exclusive duty to install any cutters for the Selby Company that might be purchased or used? [42] A. That was my job.

Q. What experience have you had in installing cutters upon machines, wood-cutting machines?

A. Well, I have had——

Mr. Callaway: Just a moment. I object to that as being immaterial, unless it is confined to this particular type.

Mr. Olson: All right. Strike that.

Q. (By Mr. Olson): Have you had occasion to install cutter heads on shapers before October of 1948? A. Yes.

Mr. Callaway: I object to that, unless it is confined to this particular type.

The Court: This is merely a general examination, to show familiarity. Overruled.

The Witness: Yes.

Q. (By Mr. Olson): Yes, you have?

A. Yes.

Q. What experience have you had in installing cutting devices upon instruments used to turn them?

(Testimony of Michael L. Chirby.)

A. Well, I grind knives, I install them, set-up man since 1929, off and on, when I could get that kind of work.

Q. Did you have occasion to install a device referred to or known as a panel raiser head for the Selby Company on or about October 25th or 26th, 1948? A. I remember that head, yes. [43]

Q. Did you install it? A. Yes, I did.

Q. When were you first given possession of that head?

A. Well, immediately after it come from Chicago.

Q. Did it come in a container? A. Yes.

Q. What kind of a container?

A. Cardboard box.

Q. Was it sealed? A. Yes.

Q. It was handed to you by whom, do you remember? A. I do. I do remember.

Q. Who was it?

A. It was the superintendent at Selby's at the time.

Q. Do you know his name?

A. Well, his name is Cornelius Leewenkamp.

Q. He gave you the sealed container and handed it to you, is that correct? A. That is right.

Q. What did you do with it?

A. I broke the seal, opened the box.

Q. Did you take it anywhere? Where did you break the seal?

A. In my shop, in my workshop there.

(Testimony of Michael L. Chirby.)

Q. You broke the seal and took it out of the box?

A. That is right.

Q. Did you then take it over to install it?

A. Not immediately, no.

Q. What did you do?

A. Well, I set it there on the bench and I called over two or three men to look at the head, what it looked like, and so on.

Q. Speaking of looking at the head, when you saw this head, that is, when you took it from the box, I will ask you if the blades of the head were in the same position they are now. I mean the arms and the blades.

A. No, sir.

Q. Where were they?

A. They was—one was here, the bottom head was setting just like it is (indicating). This was around here, and one was here and other blade was over in here, and one here (indicating). It was so that they would cut alternately.

Q. If I understand you correctly, and so the jury can perhaps have a clearer conception, is it your testimony that this upper cutter was placed, was in such a position that the lower—a lower was here and an upper here and a lower here, they alternated?

A. That is correct.

Q. In other words, they were not parallel? [45]

A. That is correct.

Q. If you look down upon it, then, it would look like it had six blades, instead of three, like it looks now?

A. That is right.

(Testimony of Michael L. Chirby.)

Q. Do I understand that is what you say?

A. Yes.

Q. When you took that raiser head from the container—for the purpose of clarity shall we designate the lower three cutters as part 1 and the upper cutters, one of which is broken off, but which was three cutters, as part 2?

My question, Mr. Chirby, is when that was taken from the box by you was cutter No. 1 and cutter No. 2 in a fixed position, and it was one unit?

A. That is correct.

Q. You didn't put cutter No. 2 on this spindle?

A. No, sir.

Q. It was already placed there?

A. It was intact.

Q. In the position in which you have described?

A. Yes.

Q. In alternate positions? A. Yes.

Q. What do you call this (indicating)?

A. That would be the shaft.

Q. The upper cutter then—— [46]

A. Of the lower part.

Q. The upper cutter was fixed to the shaft?

A. Yes.

Q. You didn't put it on? A. No, sir.

Q. Now, did you observe, when you looked at this cutter, where the pins on the two arms and where this pin was, in relation to the shaft? That can be answered yes or no. Did you? A. Yes.

(Testimony of Michael L. Chirby.)

Q. Were they in the position at that time as they are now? A. No, sir.

Q. Where were they?

A. This Allen screw here (indicating).

Q. Pointing to the screw in the arm of the upper cutter?

A. It is an Allen screw. It fits over here on a flat spot—flat filed, rubbed-off spot.

Q. On the shaft?

A. Yes, right there (indicating). There is supposed to be a pin in here, which fits in this keyway (indicating).

Q. Did you observe whether that pin was there?

A. Well, at the time you cannot notice. It is flush.

Q. Was there a hole there as there appears now (indicating)? [47] A. No.

Q. There was something in there?

A. There was.

Q. You wouldn't observe it was flush with the screw? A. That is right.

Q. What do you call those?

A. Allen screw.

Q. You did observe this Allen screw and this Allen screw (indicating)? A. Yes.

Q. Instead of being in their present position they were over where they would be parallel with the flat open shaft? A. That is right.

Mr. Olson: The jury cannot see that part. This is the groove (indicating) where Mr. Chirby has

(Testimony of Michael L. Chirby.)

testified a pin was, which you can't see because it was flush, it was here in this groove (indicating).

These here and here (indicating) were in such a position that you will notice—you will have an opportunity to observe these. There are flats on the shaft. It is his testimony that those pins were over here, where this one would be against this flat, and this one would be against this flat (indicating), the flat on the shaft.

Q. (By Mr. Olson): Then you went over and installed that [48] panel raiser head, is that correct?

A. Correct.

Q. What did you install it upon?

A. On the double spindle shaper, a Porter shaper.

Q. Porter double spindle shaper? A. Yes.

Q. Will you explain to the jury, Mr. Chirby, what a spindle is?

A. A spindle is a shaft running vertically up and down.

Q. I have here a pamphlet put out by the Porter Company. I understand this was a Porter shaper you installed, this part?

A. That is correct.

Q. I call your attention to the photograph contained on the front page of that pamphlet, and ask you if that is a picture of the shaper on which you installed this panel raiser head?

A. It is the same fixture.

Q. That is the same shaper?

A. It looks the same.

(Testimony of Michael L. Chirby.)

Q. Calling your attention to page 3 of the same pamphlet, is that another picture from another angle? A. That is from the front side.

Q. Will you point out to me, so I, in turn, may point out to the jury, from this picture on page 3 what you mean [49] when you say "spindle"?

A. This part right here (indicating). It runs all the way down to the bottom here (indicating).

Q. Do I understand you to mean the spindle is what any cutter is installed upon?

A. That is correct.

Mr. Olson: I call your attention, ladies and gentlemen, to this. This is the flat table. The wood is held on this table. He pointed to the device that strikes out. The mechanism fits over it. That is what it is connected to.

I will offer this in evidence as Plaintiff's next in order.

The Court: All right.

Mr. Olson: I particularly referred in the testimony to the front page and page 3.

The Clerk: Is this admitted, Your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(The document referred to was marked Plaintiff's Exhibit 3, and was received in evidence.)

A Juror: I would like to take a look at it.

Mr. Olson: I will call to the attention—the box is pretty big——

(Testimony of Michael L. Chirby.)

The Court: Just give it to the juror. Do not make any comment. [50]

Mr. Olson: Page 1 and page 3.

Q. (By Mr. Olson): You then, as I understand it, took that particular panel raiser head over to the Porter shaper, as you identified it in Plaintiff's Exhibit 3, and installed it? A. That is correct.

Q. Will you explain to the jury in as much detail as you can exactly what you did and how your performed this installation?

A. Well, first, if there is a pair of knives in the—on the spindle between collars that has slots, I take that——

Mr. Callaway: Just a moment, your Honor. I think the witness ought to be instructed the question was did he on this particular one.

The Court: Do not say what you would do. Just what you did on this one.

The Witness: I taken this head to the shaper and slipped it down on the shaft and put a three-quarter-inch collar on top of that and put the nut on and took the wrench and tightened it down.

Q. (By Mr. Olson): Is there any device on that panel raiser head which would—does it have, that panel raiser head, any bore or screws in the inside of the shaft?

A. No, there isn't anything in there. It is smooth inside. [51]

Q. What then on that panel raiser head is the security for that raiser head on the spindle?

(Testimony of Michael L. Chirby.)

A. Well, the security of it is by tightening the nut down securely enough to hold it.

Q. Is that the way all raiser heads are held?

A. That is correct.

Q. Did you bring with you the nut that you used on the tightening of this particular raiser head?

A. I did.

Q. You know it is the same nut that was used on this panel head when it broke? A. Yes, sir.

Q. How do you know that?

A. Well, it is a right-hand thread and it is on a right-hand spindle.

Q. Is it the only one you have on that machine?

A. On the machine, yes.

Q. It was the same one that was used at the time Mr. Byrne was injured?

A. That is correct.

Q. Did you bring with you the device you used to tighten that nut? A. Yes, sir.

Q. Is it the same device you used to tighten the nut on this particular panel head? [52]

A. That is correct.

Q. This is the device you used to tighten, that you used on this particular panel raiser head when it was placed upon the Oliver shaper?

A. That is correct.

Q. You tightened it with this wrench (indicating)? A. That is correct.

Q. Will you explain to the jury how that is done?

(Testimony of Michael L. Chirby.)

A. Well, this is the right-hand thread and washer fits on there and turns on (indicating), and then you take this wrench and tighten it up with all the strength you have, and then give it another turn if you can.

Q. Now, the spindle on the shaper, when this is placed upon it, sticks out in the air considerably?

A. Yes, it does. It has about four inches of thread on it.

Q. What do you use to make up for that distance? A. Collars.

Q. In other words, as I understand it, to get a rough idea, this is placed on a spindle and the spindle is what sticks up to about here (indicating)?

A. That is correct.

Q. The screw stays here, but when you have that distance you would put collars on that, so that when this is affixed it is down on collars which, in turn, are on top of that? [53]

A. That is right, with the exception of I must have a full nut of thread so it will be secure and safe.

Q. In other words, you adjust the collars to the point where you have a full nut of thread?

A. That is right.

Mr. Olson: I will offer these in evidence as Plaintiff's next in order.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 4 and 5 in evi-

(Testimony of Michael L. Chirby.)

dence. Plaintiff's Exhibit 4 being the wrench and Plaintiff's Exhibit 5 being the nut.

(The articles referred to were marked Plaintiff's Exhibits 4 and 5, respectively, and were received in evidence.)

Q. (By Mr. Olson): What is the circumference of the spindle on this particular shaper?

A. An inch and a quarter.

Q. What is the bore of this particular raiser head?

A. Inch and a quarter.

Q. In other words, when that particular raiser head is placed upon the spindle it is a tight fit?

A. It is snug, yes.

Q. You say you placed that raiser head on the shaper and you used the wrench now in evidence, which you have identified, and you tightened it as much as it will go? [54]

A. Yes sir.

Q. Did you tighten any of the screws on the raiser head itself?

A. Yes, sir.

Q. What did you use to tighten those?

A. Used an Allen wrench and also socket wrenches.

Q. After you had installed this raiser head on the shaper, what else did you do, if anything?

A. I started the machine up and put a board through, to see how the reaction was, whether there was any vibration or anything at all.

Q. Did you find any vibration?

A. No, I did not.

Q. Did you find that there was any indication

(Testimony of Michael L. Chirby.)

that anything of any nature was wrong with this raiser head or wrong with your installation of it?

A. No, sir.

Q. Who was present when you put this on and ran that board through it and tightened all these screws?

A. Bill——

Q. Mr. Byrne?

A. Mr. Byrne. Glen Gatewood and myself—and who else? Someone else was there. I don't know who it was. There was four of us there.

Q. Did anybody else, to your knowledge, test that raiser [55] head's installation after you were there?

A. Yes sir. There was Glen Gatewood who tested it.

Q. Were you there?

A. Yes.

Q. What did he do?

A. I was there.

Q. What did he do?

A. He run another board through it, the same as I did.

Q. Were any other tightening processes made after it had been run a while?

A. After it had run a little while I tried it again for tightness, and it was tight.

Q. Did anybody else test it, to your knowledge, besides you and Mr. Gatewood?

A. No.

Q. Do you know, to your personal knowledge, how many revolutions per minute that particular Oliver shaper will make?

A. That machine turns over 7200 revolutions per minute..

(Testimony of Michael L. Chirby.)

Q. Is that the maximum?

A. That is the maximum.

Q. Did you test it?

A. Yes, sir, I had an indicator on it.

Q. Did you know that that raiser head had broken on October 28, 1948?

A. Repeat the question, please. [56]

Q. Did you know that that raiser head had broken when the plaintiff, Mr. Byrne, was using it on October 28, 1948?

A. Yes, I know it was broken.

Q. How did you first become aware there had been an accident?

A. One of the boys came and told me.

Q. What did you do when you heard about it?

A. I went up there about two hours later.

Q. You didn't go immediately after the accident?

A. No.

Q. When did you first see that panel raiser head after the accident?

A. Well, it was still on the machine about two hours after the accident.

Q. You saw it then? A. I did.

Q. Did you examine it? A. Yes sir, I did.

Q. Aside from the holes here and these holes here, which were made for chemical analysis, et cetera (indicating), is that shaper as it now sits there, that raiser head as it now sits there, in substantially the same condition as it was when you observed it after the accident?

(Testimony of Michael L. Chirby.)

A. Counsellor, I don't understand the question.

Q. Well, I will put it this way: Is that raiser head, [57] or does that raiser head look to you now, with the exception of these holes that have been drilled in it, obviously, as it did when you saw it after the accident on the machine?

A. That is right.

Q. Are the cutters in the same approximate position as they were when you saw it on the machine?

A. Yes, sir.

Q. It is your testimony they weren't in that position when you installed it?

A. No, sir.

Q. Did you see this hole in the broken-off arm when you saw it, when it was on the machine?

A. Yes, sir.

Q. Is it substantially the same shape and form and depth as it was when you observed it?

A. Absolutely.

Q. Did you measure the depth of that hole?

A. No, sir.

Q. You looked at it and you saw a hole, and the hole looked the same as it does now?

A. That is correct.

Mr. Olson: I think that is all.

The Court: Cross-examine. [58]

Cross-Examination

By Mr. Callaway:

Q. Mr. Chirby, at the time you installed this device, as far as you know, there was one pin into this

(Testimony of Michael L. Chirby.)

key slot and two more against the flat here, is that right (indicating)?

A. Two Allen screws was against the flats.

Q. An Allen screw is a screw that has a flat surface on the end, so that it fits flat against the flat on the shaft, does it not? A. That is correct.

Q. Then over here where you have the key slot there was another pin (indicating)? There was also another pin inserted into this key slot, was there not, to hold——

A. Supposedly.

Q. In so far as you could ascertain wherever the hole is, it was closed, was it not, opposite the key slot?

A. That is correct—not opposite, directly by——

Q. That is what I meant, directly by. It was directly by, so it would engage the key slot?

A. That is right.

Q. Is this screw that I hold in my fingers the one that was opposite the key slot?

A. Just what do you mean?

Q. Here is what I mean: I am not trying to confuse you. Show us on here which hole was opposite the key slot. [59]

A. Here you are. This one here was right there on the key slot (indicating).

Q. I get it. So that when you installed this the hole here was opposite the key slot (indicating).

A. Yes.

Q. It had a pin in it? At least, it was flush with the outside of the——

(Testimony of Michael L. Chirby.)

A. That is correct.

Q. I see. Now, when this came to you in the box were these cutters installed? By that I mean the cutting edges? A. They were.

Q. They were in position?

A. They were in position.

Q. Did you change their positions or adjust them any before you put the device on the shaper?

A. I did not.

Q. I take it that they are adjustable, so that if you want a wider or narrower cut to be made you adjust them up or down?

A. Well, they are adjustable for depth but not for width.

Q. I understand. You can't make them any wider this way, but you can change them that way (indicating).

A. That is correct.

Q. So that at the time you installed it the cutting [60] edges were in place to give you the amount of cut that you wanted to make in the board?

A. Exactly.

Q. Now, did you ever install one of these before, one of these heads? A. Yes, sir, I have.

Q. The same make, of the Woodworkers'?

A. I don't remember.

Q. Had you ever seen one before, Woodworkers'? A. I had not.

Q. Now, when you came back there two hours later was the pin that was inserted opposite the key-hole sheared off?

(Testimony of Michael L. Chirby.)

A. It was just like it is right now, sir.

Q. Well, did you make any effort to determine whether or not there was any shearing off of the end of that pin?

A. Evidently there was a shearing off because the hole was showing.

Q. In other words, the pin that had been in there was missing, is that it?

A. That is correct.

Q. How about the Allen pins on the other side where the flat is? A. They are still there.

Q. But they appear to be distorted, do they not? Or does this look just like it did when you put it in? [61]

A. They look just exactly like I put them on, like they were when I received the head.

Q. Did you make any examination to determine whether those Allen pins were in tight when you installed them? A. Yes, sir, I have.

Q. I mean, did you before you put this device on, did you determine whether or not they were tight?

A. I tightened them.

Mr. Olson: That is already testified to. That is repetitious. He testified he tightened them.

The Court: That is all right. This is cross-examination. Go ahead.

Q. (By Mr. Callaway): You tightened them up before you put the device on?

A. That is correct.

The Court: I did not understand which pin was sheared off.

(Testimony of Michael L. Chirby.)

The Witness: This one, your Honor (indicating). There was a pin in there (indicating).

The Court: In other words, that was gone.

The Witness: It fit in this slot right there (indicating). That was gone.

The Court: You put that in?

The Witness: No, sir.

The Court: It was there when you put it in? [62]

The Witness: It was there when I put the head on.

The Court: But when you saw it again that had disappeared.

The Witness: That was gone, yes.

The Court: Did you try to find out what became of it, whether anyone had dropped it when they took it apart, or what?

The Witness: It is so small, your Honor, I wouldn't even attempt to look for it.

The Court: You would not attempt to look for it. You would look for it before you installed it because the equipment would not be complete, would it, without it?

The Witness: I could not see it, your Honor, because this was flush, just as smooth as that is (indicating). You couldn't hardly see there was a pin in there. That hole was directly opposite of this slot (indicating).

The Court: You are talking about the time you examined it?

The Witness: Yes, at the time I put it on.

(Testimony of Michael L. Chirby.)

The Court: To use the language of patent lawyers, that is a missing member, as we would call it?

The Witness: That is correct.

The Court: Patent lawyers like to say member. Everything is a member of something.

Q. (By Mr. Callaway): In order to disassemble this top [63] member you would loosen the Allen pins and simply slip the member off the shaft by letting the pin that fits in the slot come up, would you? Is that right? A. That is correct.

Q. Now, how often when those heads are in operation do you adjust the blades That is, where they are being used all day.

A. All day?

Q. Yes. I will put it to you this way: I will ask you a leading question. Don't you adjust those blades three or four times a day, where the machine is in constant use? A. Indeed not.

Q. Well, how often would you say that they require adjustment?

A. As long as they are doing the proper work they do not need adjusting.

Q. Let me ask you this: Have you had enough experience with this particular cutting head to know how often, when you are cutting soft wood, fir or pine, that the blades have to be adjusted?

Mr. Olson: May I interrupt? I don't mean to interrupt, really. What do you mean "adjust"? Do you mean adjusted for the cut or just tightened?

Mr. Callaway: Either tightened or adjusted for the cut.

(Testimony of Michael L. Chirby.)

The Court: Yes. All right. Go ahead. If you can answer, [64] answer the question.

The Witness: The only time that I——

Q. (By Mr. Callaway): My question is, have you had enough experience with that particular type or make of head——

The Court: Mr. Callaway wants to know if you have had enough experience to know.

The Witness: Yes, I have.

Q. (By Mr. Callaway): With that particular make of head?

A. Not this particular type of head, but with similar ones.

The Court: Would the absence of that pin have any effect on the operation?

Mr. Olson: Which pin, your Honor?

The Court: The pin that is gone now.

The Witness: This pin, your Honor (indicating)?

The Court: Yes.

The Witness: Yes, it would.

The Court: What would be the effect?

The Witness: The effect would be that it wouldn't be the strength required.

The Court: It might not affect the structure of the entire mechanism?

The Witness: It would not affect the structure.

The Court: All right.

Q. (By Mr. Callaway): Well, if the pin was gone that fit [65] into the slot, then the only pressure that will hold the top member in place would

(Testimony of Michael L. Chirby.)

be the Allen pins on the flat side?

A. That is correct.

Q. That would tend to cause the top member to be movable, provided you overcame the pressure applied by the Allen pins around on the shaft, wouldn't it? A. It would.

Q. Now, let me straighten this out. You have referred to a Porter shaper you installed this on, and Mr. Olson referred to an Oliver shaper. Which was this? A. A Porter.

Mr. Olson: I meant a Porter shaper.

The Court: All right.

Q. (By Mr. Callaway): At what revolutions per minute was the machine regulated to when this head was installed? A. 7200 revolutions per minute.

Q. In other words, it was at its highest?

A. That is correct.

Q. The maximum.

A. It runs at its highest at all times.

Mr. Callaway: I think that is all.

Redirect Examination

By Mr. Olson:

Q. You stated that the Allen pins were just like they are now when you saw the device, the member, after the accident? [66]

Mr. Callaway: No, he didn't. He didn't state that. He said they appear to be distorted.

Mr. Olson: I think his testimony was——

Mr. Callaway: All right.

Q. (By Mr. Olson): They were just as they are

(Testimony of Michael L. Chirby.)

now, they were that way after the accident, isn't that what you said? In other words, those Allen——

The Court: Give the witness a chance to answer. You are starting another question.

The Witness: They were at the time of installation——

Q. (By Mr. Olson): No. I am not talking——

A. ——on the flat spots.

Q. I am not talking about that. I am talking about—are the Allen pins in the same condition—what was the word used—do they look the same to you now as they did after you examined that, after the accident?

A. Yes, they look the same to me.

The Court: If you remove the Allen pins, and assume the other pin was against the cut there, would it not take quite a pressure to pull that off, nevertheless, without the Allen pins in there?

The Witness: I believe it would.

Q. (By Mr. Olson): In other words, if you took the Allen pins out now and that other pin—what do you call it, a cotter pin—— [67]

A. That is a keyway.

Q. All right. If the keyway was in and you took the Allen pins out, you couldn't take it and pull it off the shaft with your hands, could you?

A. No. You would have to pry it off.

Q. Did you tighten the cutters before you installed that? A. Yes.

Mr. Olson : That is all.

(Testimony of Michael L. Chirby.)

Recross-Examination

By Mr. Callaway:

Q. Did Mr. Byrne assist you in any way in installing this machine?

A. It is not his work, sir.

Q. I didn't ask you that. I asked if he assisted you in any way in installing the device?

A. No, sir.

Q. Did he assist you in any way in adjusting or installing the cutting blades? A. No, sir.

Q. Let's straighten this out. This pin that fits into the slot, that doesn't have any indentation for a screwdriver to fit in, or anything of that sort? That smooths down to the same surface as the shaft, is that right? A. That is correct. [68]

Mr. Callaway: That is all.

Mr. Olson: Was Mr. Byrne present when you installed that part?

The Witness: Yes, sir.

Mr. Olson: That is all.

Mr. Callaway: Who is Mac, may I ask? Who is Mac?

The Witness: Mac?

Mr. Callaway: Yes. Some fellow that worked out there you called Mac.

The Court: He did not mention a Mac.

Mr. Callaway: You don't remember him?

The Witness: No.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.)

The Court: It might be a good idea to pass Plaintiff's Exhibit 2 to the jury.

Mr. Olson: All right. This is very heavy and very dangerous. I will give you the box with the other parts in it.

The Court: Call your next witness.

Mr. Olson: Mr. Leewenkamp. [69]

CORNELIUS LEEWENKAMP

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Cornelius Leewenkamp.

Direct Examination

By Mr. Olson:

Q. Mr. Leewenkamp, where are you employed at the present time?

A. Associated Manufacturing Company, Pasadena.

Q. As a salesman? A. Yes, sir.

Q. Were you employed by the Selby Company in the month of October of 1948? A. I was.

Q. Speak up, Mr. Leewenkamp, so we can all hear you. You were? A. Yes.

Q. In what capacity were you employed?

A. I was shop superintendent.

(Testimony of Cornelius Leewenkamp.)

Q. Of Selby's? A. Yes.

Q. Did you duties concern themselves with having anything to do with the wood in the shop being used? [70] A. Yes, sir.

Q. What were those duties concerning wood?

A. To see that we had an adequate amount of pine in the shop for the production for the following day, as well as the operating day.

Q. Were you working in the shop on the day of October 28, 1948? A. Yes, sir.

Q. Do you know what kind of wood Mr. Byrne was working with on that date? A. White pine.

Q. Where was that white pine kept that Mr. Byrne was working on?

A. You mean before?

Q. Before the accident? It was kept outside and then brought inside the plant.

Q. Do you know when this particular lot of white pine was brought inside the plant, to be machined?

A. Yes, sir.

Q. When?

A. It was brought in approximately 3:00 o'clock a Wednesday afternoon. The date I cannot be certain of.

Q. Do you know what was done with the wood when it was brought in? [71] A. Yes, sir.

Q. Will you explain to the jury and court what was done?

A. The lumber was brought in. It was random lengths and widths. It was cut up into 37-inch-length pieces. It was also ripped.

(Testimony of Cornelius Leewenkamp.)

Q. What do you mean by "ripped"?

A. It was taken to a joiner and one edge joined first. Then it was taken to a rip-saw, which is a table saw with a ripping blade on it, and it was cut to widths, such as 5, 6, 7, and 8 inches in width.

Then it was taken to the sander and sanded two sides of it, and then taken to the shaper which Mr. Byrne was operating, to make the raised panels for the doors.

Q. Did the men who perform those operations you just described have any instructions regarding finding any knots or foreign substances in any wood they cut? A. Yes.

Q. Who gave those instructions?

Mr. Callaway: I object to that as being self-serving, and hearsay.

The Court: I cannot see the materiality of that. I will sustain the objection. We are concerned with this particular piece of wood. The objection will be sustained.

Q. (By Mr. Olson): You recalled this particular lot of wood that Mr. Byrne was cutting, is that correct? A. Yes.

The Court: If he knows what was done, all right. What instructions were given is not material, that were given in general.

Q. (By Mr. Olson): Do you use wood with knot-hole sin it for the purpose of making panels?

A. No, sir.

Q. Why?

(Testimony of Cornelius Leewenkamp.)

A. Because the doors that we were making at the time were supposed to be knot free.

Q. I don't know what you mean.

A. Eliminating all knots and blemishes in the wood, to make a perfect door.

Q. Do you allow pit pockets or any blemishes in this particular wood? A. No, sir.

Mr. Callaway: I cannot hear you.

Mr. Olson: I am sorry.

Q. (By Mr. Olson): Were you in the plant when this panel raiser head was installed on the shaper? A. Yes, sir.

Q. Did you have occasion to see this panel raiser head before it was installed? A. I did. [73]

Q. Where did you see it?

A. I saw it when Mr. Chirby took it out of the container, out of the box that it was shipped in.

Q. You were present when he took it out of the container? A. I was.

Q. Was the box sealed? A. It was.

Q. When you saw that panel raiser head when it was taken from the box were the arms of the cutters in the same position as they are now?

A. No, sir.

Q. Will you explain to the jury in what position they were, as distinguished from what position they are now?

A. I believe you call this No. 2, don't you, and this No. 1 (indicating)?

Q. For clarification, we will call the upper cutter No. 2 and the lower cutter No. 1.

(Testimony of Cornelius Leewenkamp.)

A. This No. 2 cutter was turned so that this arm was between these two here (indicating). In other words, it was sticking out right here, and that made all three of them come in between these two (indicating).

Q. In other words, it would be the same as though I would take that and turn it about three-quarters of an inch, so this would be over here and this over here and the broken [74] arm, if it were there, would be here between the lowers (indicating)?

A. That is correct.

Q. That is the way it was when taken from the sealed box?

A. Yes.

Q. Did you observe whether this arm was on it when it was taken from the sealed box?

A. It was.

Q. Did you observe whether this blade was broken when taken from the sealed box (indicating)?

A. It was not broken.

Q. Were these drill holes, a part of No. 2 and a part of No. 1, drilled in there at that time?

A. No, sir.

Q. Were you present when Mr. Chirby installed that part on the shaper?

A. No, sir.

Q. Did you witness the accident?

A. No, sir.

Q. Did you know there was an accident on October 28th in which Byrne was involved?

A. Yes, sir.

Q. How did you know about it?

(Testimony of Cornelius Leewenkamp.)

A. From one of the other men in the plant. [75]

Q. Did you go over to the scene of the accident?

A. Not immediately, no.

Q. But you did go?

A. Approximately two hours after the accident happened, yes.

Q. Was that panel raiser head on the shaper when you got there? A. Yes, sir.

Q. Did you observe it? A. Yes, sir.

Q. Was it in substantially the same condition as you find it now? A. Yes, sir.

Q. Getting back to the time you saw the shaper when it was taken out of the box, did you notice whether that hole that I am pointing to on part No. 2 was there?

A. I couldn't say. I don't—I couldn't answer that.

Q. You don't know whether it was there or not?

A. No, I didn't look that close. It was apparently hard to see.

Q. Was that hole there when you looked, after the accident when you looked?

A. I don't remember—yes.

Q. Yes, that hole was there?

A. That hole was there. [76]

Q. Did you observe this broken arm when you saw it after the accident (indicating)?

A. I did.

Q. Was this hole, which I designate as a blow-hole, present when you saw it after the accident?

(Testimony of Cornelius Leewenkamp.)

A. Yes.

Q. And it was approximately the same size and shape as it is now? A. Yes.

Q. I understand that this cutter was broken off, is that correct (indicating)? A. Yes.

Q. But these little holes, the drill holes, weren't there? A. No.

Q. To your knowledge was the soft pine which Mr. Byrne was cutting on the occasion of this accident wet? A. No, sir.

Q. How do you know it wasn't wet?

A. Well, to my knowledge the lumber had been tested with some type of an indicator. I don't remember the name. I don't recall the name of the indicator. To my knowledge, it was dry.

Q. The test you refer to, is that a test for lumber wetness? [77] A. Yes.

Mr. Olson: I think that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Callaway:

Q. Mr. Leewenkamp, did you give this cutter at any time to Mr. Byrne to install? A. No, sir.

Q. Did you have an employee there that was known as Mac at that time?

A. I don't think so. There are so many men here it is hard to say.

Q. All right. Did you give any of the blades to Mr. Byrne to install? A. No, sir.

(Testimony of Cornelius Leewenkamp.)

Q. Do I understand you correctly that you gave the whole—you didn't have any extra blades, I take it?

A. No, sir.

Q. You gave the whole machine that was boxed up, or the device that was boxed up to Mr. Chirby?

A. To Mr. Chirby, yes.

Q. Did you see him install this?

A. No,

Mr. Callaway: That is all.

The Court: Did you see him take it out of the box? [78]

The Witness: I did.

Mr. Callaway: I take it it was a new device and you examined it rather closely.

The Witness: Yes.

Mr. Callaway: You did not see anything that appeared to be wrong with it, did you?

The Witness: No.

Mr. Callaway: It looked like a well-machined new tool?

The Witness: To my knowledge, yes.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Olson: Mr. Byrne.

WILLIAM J. BYRNE

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: William J. Byrne.

Direct Examination

By Mr. Olson:

Q. You will have to keep your voice up, now, Mr. Byrne, [79] so we can all hear you. Where do you reside? A. In Alhambra.

Q. Are you married? A. Yes, sir.

Q. Do you have any children? A. Yes, sir.

Q. How many? A. Two.

The Court: Is he an expert?

Mr. Olson: No. I am introducing him to the jury. He is the plaintiff.

The Court: All right. I didn't get his name.

Q. (By Mr. Olson): How old are you?

A. Thirty-four.

Q. Were you ever employed by the Selby Company? A. Yes, sir.

Q. When were you first employed?

A. Oh, about October of 1948.

Q. Were you ever employed by any woodworking concerns before you were employed by the Selby Company? A. Yes, sir.

Q. Which ones?

A. Glendale Lumber Company.

(Testimony of William J. Byrne.)

Q. Any others? A. No, sir. [80]

Q. How long did you work for the Glendale Lumber Company? A. About three years.

Q. What were your duties there?

A. I had charge of the mill, the saws, the planers, joiners, the bandsaws.

Q. You worked with those kinds of devices for about approximately three years, is that correct?

A. Yes.

Q. Before you got your job with Selby?

A. Yes, sir.

Q. When you were employed by Selby, what capacity were you employed in?

A. Well, I was classed as a millman.

Mr. Callaway: I move to strike that out, as to what he was classed as, as not responsive.

The Court: That is not an objection. We do not follow the absurd rule some of you lawyers have had the legislature write into the statute books, that an answer is not good if it is not responsive. A witness can give facts.

Mr. Callaway: Your Honor, we practice so much in the State Courts——

The Court: I know that. We are not required to follow the State rules. If we follow them we are warned by the Rules to favor rules that favor admissibility, rather than [81] those that exclude. Since the new rules were enacted not a case has been reversed in the Circuit Court of Appeals in 12 years on admissibility of testimony.

Q. (By Mr. Olson): What were your duties

(Testimony of William J. Byrne.)

when you were employed by Selby Company?

A. To run the sander, the shaper, the cutoff saw, the table saws, and to check the material.

Q. What were your earnings in October of 1948 from the Selby Company?

A. I believe it was \$1.50 an hour.

Q. \$1.50 an hour. How many hours a week did you work?

A. It varied. Sometimes we had overtime.

Q. The average? A. 40 to 48.

Q. 40 to 48 hours a week? A. Yes, sir.

Q. Have you ever worked with panel raiser heads or cutters of that nature before?

A. Yes, sir.

Q. The last place you said you worked, before, what was the name of that place?

A. Glendale Lumber Company.

Q. At that place you used cutters of that nature?

A. No.

Q. Where did you use them? [82]

A. At the Selby Company.

Q. Calling your attention to October 28, 1948, did you receive an injury on that date?

A. Yes, sir.

Q. What did you do? What were you doing just before you received this injury?

A. I was running a panel through this raiser head.

Q. Getting back to that raiser head, when did you first see that raiser head?

A. About a day and a half before it was in-

(Testimony of William J. Byrne.)

stalled.

Q. Where did you see it? Where did you first see it?

A. When it was brought over to the machine to be installed.

Q. By whom was it brought over to the machine to be installed? A. Mr. Chirby.

Q. You watched him install it?

A. Yes, sir.

Q. Did you assist in the installation?

A. No, sir.

Q. Did you observe Mr. Chirby or anyone else test the apparatus as installed, after it had been installed? A. Yes, sir.

Q. What test did you observe them to make?

A. For fitness, testing. [83]

Q. That is a conclusion.

A. Testing the shaft for looseness, straightness and testing the depth of the cut, and so on.

Q. Did you make any test?

A. After it was installed I took the wrench that Mr. Chirby used to tighten the top of this cutter head, to make sure myself that it was tight.

Q. Did you give it a preliminary run after you did that? A. Yes, sir.

Q. Did you notice any vibration?

A. No, sir.

Q. By the way, when you did take this wrench, could you get any more turn to it? A. No, sir.

Q. Is this the wrench you used (indicating)?

A. Yes, sir.

(Testimony of William J. Byrne.)

Q. To your knowledge is this the bolt that was used to attach this to the spindle on the shaper?

A. Yes, sir.

Q. Calling your attention to Plaintiff's Exhibit No. 3, I will ask you if this picture that appears in the front cover is a picture of the shaper upon which you were working. Not the exact one, but the same type of shaper you were working on at the time of the accident? [84]

A. Yes, sir.

Q. You say that the man in that photograph is standing in a similar or almost exact position as you were at the time of the accident?

A. Yes, sir.

Q. Calling your attention to page No. 3 of the same pamphlet again, is that a picture of the same type of device upon which you were working?

A. That is the front side of it.

Q. The picture on the front is what?

A. It is looking at it endways.

Q. Will you show me on the picture on page No. 3 what is the spindle?

A. It is this middle part coming up through the table here (indicating).

Q. You are pointing to the shaft coming up outside the top of the table?

A. Yes.

Q. At the time of the accident were there two cutters on this shaper or only one?

A. I don't believe I understand your question.

Q. At the time of the accident were there two raiser heads installed or just one?

A. Just the one.

(Testimony of William J. Byrne.)

Q. In other words, the other spindle wasn't being used? [85]

A. That is right.

Q. What kind of wood were you working with at the time of the accident? A. Pine.

Q. Calling your attention to Plaintiff's Exhibit 1, is this similar to the wood upon which you were working at the time of the accident?

A. That is very similar to it.

Q. Is it the same, approximately the same width and length?

A. To the best of my knowledge it is the same length. I believe it may have been an inch or two wider.

Q. Which may have been——

A. This way (indicating).

Q. Which one? This may have been, or yours?

A. Mine.

Q. The one you were working on might have been wider than this? A. Yes.

Q. Will you show the jury this, assuming this is the platform of the shaper (indicating), what you were doing with that wood at the time of the accident?

A. This cutter blade here is revolving, and you take the board and push it through this way, and these arms, when it gets through, comes out to this finished cut (indicating). [86]

Q. In other words, it makes these beveled edges on each side? A. That is right.

Q. And cuts the bottom and the top at the same time? A. That is right.

(Testimony of William J. Byrne.)

Q. To your knowledge had anyone else worked with that panel raiser head, other than you?

A. No, sir.

Q. Before it broke, that is? A. No, sir.

Q. When did you first do any work with it?

A. It was about 3:00 o'clock in the afternoon of the 27th.

Q. What were you working with about 3:00 o'clock, until quitting time, on that date?

A. The same type of soft pine wood.

Q. Doing the same work you have just described to the jury? A. The same type.

Q. What time did you quit?

A. Four o'clock.

Q. What time did you report to work on whatever day it was, October 28, 1948?

A. Eight o'clock.

Q. You immediately proceeded again to go to work? [87] A. Yes.

Q. The same wood and the same panel head?

A. Yes.

Q. Before the accident did you observe anything out of the ordinary about the operation and performance of that panel raiser head?

A. I had just finished checking the panel head and the motor and the belt and the whole machine, before I started it up.

Q. That is not my question. Listen to my question again. A. All right.

Mr. Olson: Will you please read the question.

(The question was read.)

The Witness: No.

(Testimony of William J. Byrne.)

Q. (By Mr. Olson): It worked just like any other cutter you had been working with?

A. Yes.

Q. Now, what time, to the best of your knowledge, did this accident occur?

A. About 8:35 in the morning.

Q. Did you have any warning that it was going to occur? A. I heard a faint click.

Q. While you were working with this wood you heard a faint click? [88] A. Yes.

Q. What, if anything, did you do when you heard that click?

A. I went below the table top.

Q. You dropped below the table top when you heard the click? A. Yes, sir.

Q. Calling your attention again to Plaintiff's Exhibit 3, the front page, you say that is the relative position you were standing in at the time of the accident? A. Yes, sir.

Q. In other words, when you dropped then you would be just where this man would be if he fell down? A. Yes, sir.

Q. Do you know, of your own personal knowledge, how fast that shaper was going at the time of the accident?

(Testimony of William J. Byrne.)

A. It was supposed to be around 7200 r.p.m.'s, revolutions per minute.

Q. You can assume it was going 7200 revolutions per minute when the accident happened?

A. Yes.

Q. As I get it now you heard a sharp click and

(Testimony of William J. Byrne.)

you dropped to the ground? A. Yes.

Q. You dropped to the ground when that happened? [89] A. Yes.

Q. Then what happened?

A. I stayed underneath the table until it had quieted down and things had stopped dropping.

Q. What do you mean "things had stopped dropping"?

A. Well, the piece of board I was working with and in a mill there are certain pipes and so forth around, and whatever broke off of this blade here was coming down—or you could hear something falling. I wanted to stay out of the way.

Q. Then what happened after the place had quieted down?

A. I got up and looked around, to see if anybody was around, or anything. That perhaps somebody would have been hit by whatever flew apart.

Q. Then what did you do?

A. Then I started to look at the machine, to see what happened.

Q. Did you find you were injured yourself in any way?

A. I took a quick look at the machine and then I figured I had better look at myself.

Q. Did you finally look at yourself?

A. Yes.

Q. What did you observe when you looked at yourself?

A. That my hand was cut across the palm, and my little finger was just barely on. [90]

(Testimony of William J. Byrne.)

Q. Was it bleeding? A. Yes, sir.

Q. What did you do next?

A. Well, I grabbed my right hand with my left, and I started to get somebody to take me to the doctor.

Q. Did somebody take you to the doctor?

A. One of the fellows ran and got the owner of the plant and he said that his car was right outside the door, and he took me to the doctor immediately.

Q. What doctor did he take you to?

A. Dr. Detwiler.

Q. Getting back to the shaper, as displayed, again, on page 1 of this Plaintiff's Exhibit 3, was there any guard or device on the top of that shaper surrounding this panel raiser head which is not shown on this picture on the one which you were operating? A. Yes, sir.

Q. What were they?

A. There was a guard in the back of this blade, to keep the material you are running through it from going into the machine too far.

Q. Was the guard on this picture also on there?

A. Yes, sir.

Q. That appears to me to be two steel arms with a board underneath, is that correct? [91]

A. Yes, sir.

Q. What is the purpose of that guard?

A. That is to hold the material from coming up. It is a spring action and it holds down tight on the board that you run through. Just tight enough you can push it through.

(Testimony of William J. Byrne.)

Q. Is it my understanding that when you are pushing that piece of board through this raiser head you have a guard coming down, coming down and pressing it down, and the guard has a spring to it so it stays in between? A. That is right.

Q. Where is the other guard?

A. It comes right across the top of this blade here (indicating). Of course, there is an opening there so the blades can go through.

Q. That guard isn't shown on this picture?

A. No, sir.

Q. But it was present on the shaper which you were using? A. Yes, sir.

Q. Are you right or left-handed?

A. Right-handed.

Q. It was your right hand that was cut?

A. Yes, sir.

Q. You say when you got up off the floor and everything had quieted down you looked at the panel raiser head, is that [92] right? A. Yes.

Q. When did you next see it after that?

A. About a month ago.

Q. Where? A. In your office.

Q. Do you know whether this hole in part No. 2 was there when you observed it being installed? If you don't remember, say so.

A. I don't remember.

Q. You don't know whether there was a pin in there or not? A. No, sir.

Q. Was the position of the arms on the cutter

(Testimony of William J. Byrne.)

at the time it was installed the same as they are now? A. No, sir.

Q. What position were they when you saw it, when you saw Mr. Chirby install it?

A. The top arms were in between the two bottom arms (indicating).

Q. Is that the way most cutters are, that you have used? A. This style is, yes, sir.

Q. When you observed this cutter after the accident, did you observe whether or not the cutter on this upper arm, the blade on this upper arm was broken off? [93]

A. Would you clarify that? Do you mean immediately after the accident?

Q. Yes.

A. At that time I did not notice it.

Q. Did you notice whether this blow-hole was there? A. Yes, sir.

Q. You noticed that right after the accident?

A. Yes, sir.

Q. Did you personally pick up the pieces of this, or did someone else? A. Someone else.

Q. Do you know who? A. No, sir.

Q. Now, what did Dr. Detwiler do for you?

A. He X-rayed my hand, cleaned it out. He checked the X-rays to see what he had to do. He repaired the hand, put the cast on and followed up with periodic checkups.

Q. How many times did you go to Dr. Detwiler? I don't mean exactly, unless you know exactly. Just approximately.

(Testimony of William J. Byrne.)

A. Twice a week for a number of weeks. I don't recall how long, several months.

Q. What did he do when you went to him?

A. He checked my hand for circulation, for reflexes, and the amount of movement I could get into it.

Q. Did he ever sew your hand? [94]

A. It was sewn.

Q. When was it sewn?

A. After he had repaired the tendons and repaired the inside of the hand.

Q. I asked you when is that, the time you went right after the accident?

A. The day of the accident.

Q. You stayed there until all that repair was done? A. Yes.

Q. He X-rayed you and sewed the tendons and sewed your hand? A. Yes.

Q. Did he put it in a cast? A. Yes, sir.

Q. How long did you wear the cast?

A. From October 28th until approximately a week before Christmas.

Q. Was it a plaster cast? A. Yes.

Q. Do you know how much money you owe Dr. Detwiler? Or have you paid him?

A. No, sir.

Q. Did you go to any other doctor besides Dr. Detwiler? A. Yes, sir.

Q. At whose request? [95]

A. At your request and the insurance company's.

(Testimony of William J. Byrne.)

Q. What is his name?

A. Dr. Joseph Boyes.

Q. How many times did you see him?

A. Five or six times, to the best of my knowledge.

Q. What did he do for you, if anything?

A. He checked my hand, my fingers, my grip, and he had me wear a brace, an elastic band on my hand for some time.

Q. Do you know what you owe or what you have paid Dr. Boyes, if anything?

A. No, sir, I don't.

Q. Did you go to any other doctor?

A. Dr. Sutherland.

Q. Did he make an examination of your hand?

A. Yes, sir.

Q. Did he make any recommendations as to what treatment you should have for that hand?

Mr. Callaway: I object to that.

Mr. Olson: I will strike it.

Q. (By Mr. Olson): Will you tell the jury as much as you know what is the matter with your hand right now?

A. My hand will not bend all the way. This finger will not close all the way (indicating). I have a loss of grip in it. I cannot hold anything. In driving a car, if I go to make a left turn I don't have enough strength in it to turn. [96] I can, but my hand will tend to slip off the wheel.

I cannot lift anything as heavy as I used to, and

(Testimony of William J. Byrne.)

it is always numb. With the least bit of cold or dampness it is just like a weight. It also affects this finger and the palm of my hand, where the tendons and bones were broken (indicating).

Q. How much can you bend your little finger, Mr. Byrne? A. (Demonstrating.)

Q. You can't bend it any more than that?

A. No, sir.

Q. Do you have a scar on your hand?

A. Yes, sir.

Q. Is that scar caused by reparative surgery or by the accident itself?

A. To the best of my knowledge it was caused by the accident, where my hand was cut open.

Q. You say you broke the bone in your hand by being hit by this part, you broke the bone in your right finger?

A. This joint here was broken clear through, cut clear through (indicating).

Q. For the purpose of saving time at another time I will have the jury look at that scar. I don't think it is necessary now.

Now, you were out of work after the accident?

A. Yes. [97]

Q. Your hand was in a cast? A. Yes.

Q. You were under medical treatment?

A. Yes.

Q. The accident happened on October 28th, of 1948, did it not? A. Yes, sir.

Q. When were you next employed?

(Testimony of William J. Byrne.)

A. It was on or about the 10th of January, 1949.

Q. That was where?

A. At the Selby Company.

Q. How long did you work there?

A. I believe it was sometime during the first week of February. I don't recall the exact date.

Q. Then you were laid off from the Selby Company?

A. Yes, sir.

Q. Then when did you go to work for anyone else?

A. I did nothing until July.

Q. Of what year?

A. 1949.

Q. You were unemployed until July of 1949?

A. Yes, sir.

Q. And then did you go to work?

A. Yes, sir.

Q. For whom? [98]

A. I worked for myself.

Q. In what business?

A. In the tree business, tree surgery.

Q. Are you acquainted with tree surgery?

A. Yes, sir.

Q. You went into that business for yourself?

A. Yes, sir.

Q. Do you have any employees?

A. Yes, sir, I have to have at least one employee to take my place on account of the loss of grip. I am not able to handle the tools. All I can do is supervise it.

Q. What is your employee's name?

A. William Rollinson.

(Testimony of William J. Byrne.)

Q. How much do you pay him?

A. It varies.

The Court: That is not material. You are not pleading any special damages he pays to an employee, as a loss to himself. There are no special damages asked, other than those incurred for medical care. You have grouped everything into general damages.

Mr. Olson: I agree. I will strike the question. I have redirect examination. I will take it then. That is all.

The Court: May it be stipulated the usual admonition has been given to the jury?

Mr. Olson: So stipulate. [99]

Mr. Callaway: So stipulate.

The Court: We will have a short recess.

(Short recess taken.)

The Court: If you have thought of any more questions you want to ask now, I will not hold you to a technicality, Mr. Olson.

Mr. Olson: Thank you, your Honor.

Q. (By Mr. Olson): Mr. Byrne, one very important question I would like to ask you is this: Who stopped the machine after the panel raiser had disintegrated?

A. The machine is equipped with a foot safety lever that acts as a brake, and also stops the machine.

As I went under the table I put my left foot on the emergency brake, and as I went down my weight topped everything.

(Testimony of William J. Byrne.)

Q. As you went down you stopped the machine?

A. The machine was stopped before I hit the floor.

Q. You did that with the application of the emergency brake? A. Yes.

Q. With your foot? A. Yes.

Q. You operated this panel raiser head for how long on October 27, 1948? A. For an hour.

Q. For how long on the morning of October 28, 1948, before it broke, did you operate it?

A. Approximately 35 minutes.

Q. In that approximately one hour and 35 minutes in which this raiser head was being used, did you find the work it was doing was satisfactory?

A. Yes.

Q. Was it making a good clean cut?

A. It made a smooth cut. There were no obstructions. There were no vibrations. It was performing perfectly.

Q. Is there any particular reason that you now are engaged in the business of tree surgery? Or, has your injury anything to do with the fact you are now engaged in the business of tree surgery?

A. My injury prohibited me from returning to mill work and due to the fact that it has limited the use of my right hand, it has eliminated me from a lot of office work. In other words, I could not get into most offices due to the fact it has impaired my writing. I am not able to use adding machines, or typewriters with efficiency.

(Testimony of William J. Byrne.)

Q. Prior to your injury could you type?

A. Yes, sir.

Q. It is your testimony you can no longer type efficiently?

A. Yes, sir. [101]

Mr. Olson: I think that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Callaway:

Q. Mr. Byrne, this guard that is shown on Plaintiff's Exhibit 3, that is attached by a couple of rods and, I take it, the length of the guard can be regulated by loosening the rods where they join the back part?

A. Yes, sir.

Q. How do you loosen them, by this little business on top here (indicating)?

A. This handle merely raises it and lowers it, and then they tighten down (indicating).

Q. How do you change the length of them, to make them shorter or longer?

A. To the best of my recollection there are screws in there that tighten the bar down when you get it regulated.

Q. Now, what other type of guard did you say was on the machine?

A. There was a guard that fit along the front of this raiser head.

Q. What type of thing was it?

A. It kept the material from going too far into the machine.

(Testimony of William J. Byrne.)

Q. What type of a guard was it? Can you describe it [102] for us, please, sir?

A. To the best of my recollection it was soft wood and approximately two inches or better in thickness.

Q. How was it attached to the table, if it was attached to the table?

A. To the best of my recollection it was bolted down.

Q. Mr. Byrne, what struck this particular arm that was broken off? A. That I do not know.

Q. I take it, of course, that at the speed at which this top member was traveling that you couldn't determine whether the arm was broken before the slipping took place on the shaft or afterward? A. No, sir.

Q. Now, you didn't push that guard that you had your left hand in against that, did you?

A. No, sir.

The Court: Have you any recollection when you first felt that you were bleeding or had a cut, after you dropped under the table?

The Witness: After I got up from the floor, your Honor.

The Court: You have no recollection of feeling anything like a cut in your hand as you dropped below?

The Witness: My right arm was numb.

Q. (By Mr. Callaway): Now, the thing that made you [103] drop below was that you heard a slight click, is that right? A. Yes, sir.

(Testimony of William J. Byrne.)

Q. It is not unusual, in operating machines like this, to hear a click of the bearing, is it?

A. When a person has operated woodworking tools for some time they get to differentiate the different sounds connected with the particular machine they are running. There is a difference of sound between hitting metal and hitting, we will say, a knot, or something snapping.

Q. You had only operated this particular machine an hour and 35 minutes before this happened, is that right?

A. Yes, sir.

Q. Well, now, the thing that you were thinking about as you went under was to get the machine cut off, to get to the emergency, was that right?

A. Well, the emergency is in such a position that you would automatically fall on it.

Q. Let me ask you this: Is there any other pushbutton device, or anything like that that you could turn the power off and stop the machine with?

A. There is the off and on switch; that will not stop the shaft.

Q. That just stops the motor?

A. Yes, sir.

Q. Now, it is my understanding that the first time you [104] ever saw this particular machine was when you saw Mr. Chirby putting it on the spindle?

A. That is the first time I have seen this particular one.

Q. You didn't assist him in any way?

A. No, sir.

(Testimony of William J. Byrne.)

Q. Did you make any adjustment on the machine at any time other than the one you told us about, testing the nut to see if that was tight?

A. No, sir.

Q. You recognize that blond gentleman sitting in the second row back there, the gentleman sitting right behind Mr. Chirby (indicating)?

A. No, sir.

Q. What is it? A. No, sir.

Q. His name is Taylor.

A. I don't know Mr. Taylor.

Q. Did you have a conversation with him at your residence on November 18, 1948?

A. I may have told a representative of the insurance company——

Q. You mean your employer's insurance company? A. Yes.

Q. As a matter of fact, he made himself known to you as [105] being a representative of the Selby Company's compensation carrier, didn't he, on November 18, 1948, when he came out to your residence?

A. That was quite a while ago and I was under stress. I didn't——

The Court: All he is asking you at the present time is if you remember the conversation. He is not asking you about details. Do you remember talking to this gentleman who has been referred to as representing Mr. Selby's compensation carrier?

The Witness: Now that Mr. Callaway has mentioned his name, I recall speaking to him.

(Testimony of William J. Byrne.)

The Court: All right. That is a good start. Now, follow from there.

Q. (By Mr. Callaway): Do you remember stating to him in words, substance, or effect that Mr. Leewenkamp gave you the device and that you and Mac installed it?

A. That Mac that you refer to—I was mixed up on Mr. Chirby's first name. I was under the impression it was Mac, but it was Mike.

Q. Regardless of who Mac is, do you remember, in stating to him in words, substance, or effect, that you and Mac installed the device on the spindle?

A. I don't remember.

Q. This is the first time that you had ever seen this [106] particular brand of cutter, is it not? I mean this one was the first one you had ever seen?

A. Will you explain that again, please?

Q. You had never seen a cutter of this make before you saw this one, had you (indicating)?

A. I had seen them of this type. I don't know whether it was the same brand or trade-mark or not.

Q. Now, at Selby's the only cutter that cut the bottom and the top at the same time they had was this one, isn't that right? A. Yes.

Q. All the rest of them were cutters that would only cut one surface at a time? A. Yes, sir.

Q. Now, the first experience that you had had with a shaper had been during your employment at Selby's?

A. I had run several of the smaller type before.

Q. You didn't have any shapers over at Glen-

(Testimony of William J. Byrne.)

dale, did you?

A. Before I never—my rating wasn't a millman, but I had run them.

Q. You mean just to see how they operated?

A. Yes.

Q. So, during the five weeks' period that you had been at Selby's, before the incident in question, you had operated [107] the single-surface cutters?

A. Yes, sir.

Q. But you didn't put that entire five weeks in operating even the single-surface cutters, did you?

A. Most of the time, yes, sir.

Q. You were not doing other things, such as joining——

A. When my material ran out I would go and help on another job.

Q. All right. Is that your initials on the first page, and the second, third and fourth (indicating)?

A. Yes, sir.

Mr. Callaway: I offer this in evidence.

Mr. Olson: No objection.

The Court: It may be received.

The Clerk: Defendant's Exhibit A in evidence.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

Q. (By Mr. Callaway): You probably have already answered this: You didn't make any adjustment on the blades during the time that you operated it?

(Testimony of William J. Byrne.)

A. I did not adjust the blades. I checked the top nut for tightness, and the guards.

Q. All right. Now, were any other cutters received at the same time that this one was received?

A. That I do not know, sir.

Q. Let me read to you from this statement:

“On 10-25-48 as far as I know, the company got in some new cutters for the shaper. Mack and myself put these cutters on the 26th. They slip over the shaft and are then bolted. They are standard mill equipment. They only got one of that particular type. When we installed them they fit o.k. After I ran the machine with the cutters it ran o.k. and did the job o.k. I had no occasion to take them off. It is customary to check them three or four times a day and each time I checked them they were o.k. These blades are fastened on an arm. There are six arms. Three on top and three on the bottom. What we installed were the complete blade and arm assemblies. That's the way the blades came. When we got them they were in a box and packed and Mr. Leewenkamp got the box. I saw him with the box, and either he or someone else unpacked them and when he gave me the blade assemblies I could see they were new parts. Just looking at them I couldn't see anything wrong with them with the naked eye. No defect could be seen.”

Now, did you put your foot on the emergency before you bent down to the floor?

(Testimony of William J. Byrne.)

A. At the same time.

Q. I see. Simultaneously, in other words? [109]

A. Yes.

Q. And at the time you did that, simultaneously putting your foot on the emergency and bending down, you knew something was going to happen, didn't you? A. Yes, sir.

Q. And the reason you knew something was going to happen, Mr. Byrne, was because something had struck this arm, isn't that right?

Mr. Olson: Which arm?

Q. (By Mr. Callaway): Isn't that right?

A. I don't believe I understand you. There was wood going through.

Q. Yes. A. Going through the machine.

Q. Were there any spikes in the wood that you saw? A. No, sir.

Q. You were supposed to look for spikes?

A. In each board before it went through.

Q. And not put it through if there were any spikes in it that you could see?

A. That is right.

Q. Now, you were not conscious of any object striking you, were you? A. No, sir.

Q. The first thing you knew was that after an elapse [110] of two or three minutes you looked down and saw your hand was bleeding, isn't that true? A. Yes, sir.

Q. Now, as a matter of fact, the cast on your hand was removed on November 27th, was it not, rather than a week before Christmas?

(Testimony of William J. Byrne.)

A. I don't recall the exact date, sir. I thought it was close to Christmas.

Q. Who sent you to see Dr. Boyes?

A. My attorney called the insurance company and asked them if they would permit me, or recommend a hand specialist to look at my hand.

Q. You mean Mr. Selby's insurance company?

A. Yes.

Q. Who sent you to see Dr. Sutherland?

A. I went there on my own. I had known of him and knew he was a hand specialist.

Q. Did he give you any treatment?

A. No, sir.

Q. Just went there for an examination?

A. Yes, sir.

Q. Did anyone at the Selby plant there give you any instructions as to the use of this particular cutting device?

A. No, sir, they didn't need to.

Q. Now, other than the little click that you said you [111] heard, did you hear any other noises in connection with the operation of that machine?

A. No, sir.

Q. As you feed the wood into the machine you have your left hand on the guard and you feed the wood in with your right, is that right?

A. I can demonstrate with the board.

Q. All right.

A. Your spindle with your blades are setting on the table, and this is up against your back guard,

(Testimony of William J. Byrne.)

which has a hole here (indicating) for the blade to come through, with your top guard coming over and pressing on this, so that it will not raise or tip indicating). You shove it through at a medium speed, like that (indicating).

Q. And the guards you are talking about that fit over the top of the wood are the same as shown in Plaintiff's Exhibit 3? A. Yes, sir.

Q. Those are fixed in the position or tightened by screws that are attached to these members back here, is that right (indicating)?

A. Yes, sir.

Q. So that by the adjustment, loosening of those screws, the guards can be either pulled out or pushed in, in keeping with the width of the wood that you are surfacing? [112]

A. This screw affair on the top has a pressure on there which it is very unlikely they would—

A. No. My question was very simple.

A. Yes.

Q. Did you regulate them that morning for the purpose of fitting the width of panel that you were surfacing?

A. I checked it for pressure, to see whether or not it was too tight or too loose, in running the board through; and they were correct.

Q. When you first started using this machine, the day before, did you regulate those guards as to how far they came out from the standards they fit into?

(Testimony of William J. Byrne.)

A. That is done before the machine is turned on and before——

Q. Did you do it? I am asking you that, Mr. Byrne. A. No, sir.

Q. Who did it? A. Mr. Chirby.

Mr. Callaway: I think that is all, your Honor.

The Court: Do you have any redirect examination, Mr. Olson?

Mr. Olson: Yes, your Honor. [113]

Redirect Examination

By Mr. Olson:

Q. Mr. Byrne, Mr. Callaway asked you the question as to exactly what struck that arm. Your answer was that you did not know. Are you of the opinion that something struck that arm?

Mr. Callaway: I object to that as calling for a conclusion of the witness.

The Court: The objection is sustained.

Mr. Olson: So did the question call for a conclusion of the witness.

The Court: Well, he was cross-examining. You cannot cross-examine your own witness.

Mr. Olson: I don't mean to cross-examine him. I want him to explain that answer.

The Court: No.

Q. (By Mr. Olson): In your opinion did anything strike the arm that broke?

Mr. Callaway: I object to that.

(Testimony of William J. Byrne.)

The Court: I will sustain the objection. He is not to give an opinion. He is not an expert. He can tell what occurred, but not give his opinion.

Mr. Olson: May I ask him did anything strike that arm——

The Court: No, you cannot ask leading questions. You can ask him if he knows what struck the arm. [114]

Q. (By Mr. Olson): Do you know what struck the arm?

The Court: I would like to find that out from you yourself, Mr. Byrne.

The Witness: I do not know, your Honor.

The Court: You do not know?

The Witness: No.

Q. (By Mr. Olson): Do you know whether anything struck the arm? A. No, sir.

The Court: As a matter of fact, you were not conscious of the injury to your hand until you began raising yourself up?

The Witness: That is right.

The Court: For all you know, you may have cut your hand on something under the table?

The Witness: There was nothing under the table, your Honor, that could have cut me.

The Court: Was there any blood around. Did you observe whether there was any blood around the cutter that would indicate you were cut while you were operating on top of the table?

The Witness: No, there wasn't any blood or

(Testimony of William J. Byrne.)

anything to indicate it before the machine broke.

The Court: When did you first see the blood, right after you got up, and was it on the floor?

The Witness: After I got up there was blood on the floor.

The Court: Was there a trickle of blood from the table on which you were operating the machine to the place where you stooped?

The Witness: In the excitement I couldn't tell you, your Honor.

The Court: I do not blame you. You were hurt pretty badly. We are just trying to find out what you do remember.

The Witness: As soon as I hit the floor, and I waited, when I got up, why——

The Court: Can you give us an idea of the lapse of time between the time you were hurt, when you heard the—what did you call it, a noise?

The Witness: A click, a sort of a click.

The Court: ——you heard the click and the time you felt any sensation of injury to your hand or numbness? I asked you a question before and you said something about your hand feeling numb.

The Witness: Yes, it was. In other words, it was more or less paralyzed. I moved my left hand before the right.

The Court: Give me first the lapse of time, if you can tell.

The Witness: Approximately, maybe a minute, a minute and a half. [116]

(Testimony of William J. Byrne.)

The Court: That feeling came to you as you were already stooped, or did it come before?

The Witness: The numbness?

The Court: Yes.

The Witness: I didn't notice it until I got up on my feet.

The Court: You were not aware of any sensation of pain or numbness before you had actually stooped under the table?

The Witness: No, sir. There was quite a bit of noise, and so forth.

The Court: I understand that.

The Witness: I may have felt it. In my opinion I don't believe I did.

The Court: You do not remember.

The Witness: No.

The Court: You do not remember the feeling?

The Witness: No.

The Court: So you are sure, however, that it was not simultaneous? There was a lapse of time between your hearing the click and your feeling any sensation of having numbness or hurting in your hand? That feeling was after you had already stooped down, is that correct?

The Witness: Yes, sir. When something that fast hits you, you don't—

The Court: On direct examination you said something about [117] that fact that the reason you ducked, as it were, was sort of instinctive, that you were trying to avoid things flying in all directions? Is that what you said?

(Testimony of William J. Byrne.)

The Witness: Yes.

The Court: Do you remember anything actually flying in all directions before you stooped, or was it that you just did it instinctively, unconsciously?

The Witness: I remember as my head got below the tabletop things flying across my head and coming down.

The Court: Before you ducked or stooped down you do not remember seeing anything?

The Witness: No, sir.

The Court: I will put it this way: Did anything else accompany this click that you heard, such as scattering of things?

The Witness: Not until after I was under the table.

The Court: Do you remember what portion of your hands were on the board?

The Witness: Yes, your Honor.

The Court: That is, when you heard the click?

The Witness: I was running the board through the shaper in this manner (indicating), and I heard the click and I just went down. This hand was the last to go down because it was the furthest away (indicating).

The Court: Did your hands slide off the board or did you [118] take them off quickly?

The Witness: I guess they were knocked off by whatever broke the board that I was running.

Mr. Olson: Your Honor, I am not trying to be dramatic here, but with your permission I would

(Testimony of William J. Byrne.)

like to ask Mr. Byrne to give me his estimation of a minute.

He testified to a minute or a minute and a half. Most people, I find, don't know what a minute means.

The Court: Ask him what he means.

Q. (By Mr. Olson): Do not look at that clock, but look over there (indicating). I am going to start, and when I say, "Now" you start, and when you think a minute has elapsed you let me know. Now. A. Oh, about now.

Q. Mr. Byrne, that was $12\frac{1}{2}$ seconds. Now, would you tell me this: You just had $12\frac{1}{2}$ seconds period of time elapse. Is it your testimony that it took that long for you to discover that your hand was hurt?

Mr. Callaway: Just a moment, your Honor. That is argumentative.

The Court: That is argumentative. I will not allow that.

Q. (By Mr. Olson): Did it take that long for you to know your hand was hurt? A. No.

Q. You felt a numb sensation in your arm before you got up from the floor?

A. When I got up on my feet.

Q. About that period of time that you just figured, is that right?

A. Well, I said roughly a minute, because I couldn't get up—under the table and up again in 12 seconds.

Q. In the time that elapsed you couldn't get up

(Testimony of William J. Byrne.)

again? A. In the time you checked me on.

The Court: You are absolutely certain that you felt no numbness or sensation until after the lapse of that period of time, whatever you call it?

The Witness: Yes, your Honor.

The Court: All right.

Q. (By Mr. Olson): Have you ever had a prior injury to your right hand, before this accident?

A. No, sir.

Q. Of any kind or nature? A. No, sir.

Q. Who wrote this statement for you that Mr. Callaway has put in evidence? Did you write it? Is this your handwriting (indicating)?

A. I don't believe I could write at that time.

Q. Is that your handwriting? A. No.

Q. It is not your handwriting? A. No.

Q. Do you know whether Mr. Taylor wrote it for you? A. I believe it was him.

Q. You testified on cross-examination that when you put your foot on the emergency brake that you knew something was going to happen. Do you mean by that something was going to happen or had happened?

A. When I heard the click I knew something was going to happen; how soon I didn't know.

Q. You dropped and put your foot on the brake?

A. That is correct.

Q. Is it your testimony that your right hand was the last part of your body to leave the surface of the machine? A. Yes, sir.

Q. Because that was the furthest part of your

(Testimony of William J. Byrne.)

body? A. Yes.

Q. That part of your body was furthest away?

A. Yes.

Q. As depicted in this picture of this man running this shaper? A. Yes.

Q. I didn't understand your answer, Mr. Byrne, when you testified on cross-examination, other than the little click you heard no other noises in connection with the machine. [121] By that answer do you mean that the plant was quiet, that you could hear a pin drop?

A. Do you mean if I heard other machines going?

Q. That is what I want to know. The way you testified on cross-examination there was not another sound except that little click you heard. Did you hear any other noise in connection with the machine was the question, and your answer was no.

The Court: No. You did not understand the question.

The Witness: I meant referring to that machine.

The Court: He meant in connection with that machine.

Q. (By Mr. Olson): That was the only unusual noise you heard, is that what you mean to say?

A. Yes.

Mr. Olson: At this time, your honor, I would like for the jury to see Mr. Byrne's hand.

The Court: He can pass in front of the jury and show them his hand. Mr. Byrne, do not make any remarks.

(Testimony of William J. Byrne.)

The Witness: Yes, sir.

Mr. Olson: That is all.

Recross-Examination

By Mr. Callaway:

Q. At the time that this happened you were in the act of putting a board through this machine, is that right?

A. It was——

Q. At the time you went down under the table you were in the act of feeding a board to the machine?

A. That is correct.

Q. So you left the board, I take it, in the machine when you went down, you dropped it and turned loose of it?

A. When I left the table, yes.

Q. Yes. What happened to the board, did you see?

A. I couldn't tell. It happened so fast I didn't know whether the board flew out endways or up or down.

The Court: As a matter of fact, you do not know what cut your hand?

The Witness: That is right, your Honor.

The Court: There was no evidence there of blood to indicate what did it?

The Witness: Only where I picked my hand up off the board.

The Court: All right.

Mr. Callaway: I have no further questions.

(Testimony of William J. Byrne.)

Redirect Examination

By Mr. Olson:

Q. Your hand wasn't cut 10 seconds before the part disintegrated?

A. No. The board was perfectly clear of all marks.

Q. I didn't ask you that. I said, your hand was not [123] cut just before the accident? A. No.

Q. It was cut after the accident?

Mr. Olson: That is all.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Olson: Mr. Cheney.

GOUGH L. CHENEY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Gough L. Cheney.

Direct Examination

By Mr. Olson:

Q. What is your occupation, Mr. Cheney?

A. Chemist and engineer.

Q. Are you employed? A. I am.

(Testimony of Gough L. Cheney.)

Q. By whom? A. Smith-Emery Company.

Q. What is that company, what business is that company [124] in?

A. They are chemists and engineers.

Q. How long have you been employed there?

A. Since 1915.

Q. How long have you been a chemist, Mr. Cheney? A. Since 1910.

Q. You are now a chemical engineer?

A. Yes, I am a registered chemical engineer in the State of California.

Q. Have you specialized in any phase of your profession?

A. Not exactly specialized but practically all branches of chemical engineering.

Q. Did you ever have occasion to make an examination of a certain panel raiser head at my request? A. I did.

Q. Is this head that is before you the panel raiser head I asked you to examine and you did examine? A. Yes, it is.

Q. How do you identify it that it is the same one? A. That is the same one.

Q. I will ask you, referring to Plaintiff's Exhibits 2-A, -B, -C and -D, if you also used these parts of the panel head in your examination?

A. I did. [125]

Q. Did you render me a report, based upon the examination made by you, which report is dated November 4, 1949? A. I did.

(Testimony of Gough L. Cheney.)

Q. Is this the seal of the Smith-Emery Company and the signature of Smith-Emery (indicating)?

A. It is.

Q. That is your report? A. Yes.

Q. The original? A. Yes, sir.

Mr. Olson: I will offer this in evidence as Plaintiff's next in order.

Mr. Callaway: Your Honor, I don't think so. The witness is here.

The Court: I do not think so, either. You cannot use a report. He is right here to testify in person.

Mr. Olson: I don't necessarily have to. I can just give it to him to refresh his mind.

The Court: He is presumed to know what he wrote there.

Mr. Olson: I would rather he would testify, anyway.

Q. (By Mr. Olson): You can have that to refresh your memory, Mr. Cheney.

When was this examination made by you?

A. Last fall—maybe it was the early summer. I would have to refresh my memory as to the date of receipt. That [126] was received on June 6th—I mean June 2, 1949, so the work was done within a month or two after that.

Q. How long did it take you to do the work you did in analyzing that part?

A. Probably a lapse of a couple of months.

Q. Where was this examination made by you?

(Testimony of Gough L. Cheney.)

A. Smith-Emery Company's laboratory.

Q. Before you made this examination did you obtain the information regarding the circumstances surrounding the necessity of having it made?

A. Yes. I was told certain circumstances that were involved in this situation.

Q. Were you informed it had broken?

A. Yes, sir.

Q. When you examined that part did you find any evidence that a previous examination had been rendered?

A. In my opinion there had been on the broken arm.

Q. What led you to that conclusion?

Mr. Callaway: I object to that as being immaterial.

Mr. Olson: I don't think so.

Mr. Callaway: It is immaterial, how many times it has been examined.

The Court: I do not think that is material.

Mr. Olson: The part has been affected by the prior examination. [127]

The Court: If there has been any change——

Mr. Olson: There has been.

The Court: ——in the structure, that is different.

Mr. Olson: Yes. That is the purpose of my question.

The Court: All right.

Q. (By Mr. Olson): What made you determine there had been a prior examination?

(Testimony of Gough L. Cheney.)

A. In my opinion there has been a sample taken out of this broken arm.

Q. By "broken arm" you are referring to Plaintiff's Exhibit 2-A? A. That is correct.

Q. You refer to this hole in the back of the cutter (indicating)? A. That is right.

Q. In your opinion that was done purposely by someone making a prior examination?

A. It is my opinion it was.

Q. What methods were used by you in making this examination? Can you describe them as best you can, so that the ladies and gentlemen of the jury and all of us can understand?

A. Of course, first I made a visual examination to find out what I could, just by close inspection.

Then I took samples from both members for chemical [128] analysis, to determine the type of metal used.

Then I cut specimens from the broken arm at the face of the fracture, in order to determine if I could the character and appearance and structure of the metal at the fracture.

Q. Now, you say you cut the metal. I will ask you if the two pieces designated as Plaintiff's Exhibits 2-C and 2-D are the parts, are the pieces you cut? A. That is right.

Q. If they were put together they would make the rest of the arm, is that correct?

A. With the exception of the small amount of metal removed by the saw.

(Testimony of Gough L. Cheney.)

Q. By the saw. Did you take any photographs of the cutter? A. I did.

Q. On the basis of your examination of this cutter and your chemical analysis, did you form an opinion as to the cause of the upper arm of the panel raiser head breaking, the one that was broken?

Mr. Callaway: Just a moment. I submit no proper foundation has been laid for the answering of that question, and it invades the province of the jury. Even an expert is limited. He can tell what he found on the strength of the arms and all those things, but to express a conclusion as to what caused that arm to break I think is far beyond the [129] province of a chemist. It invades the province of the jury.

Mr. Olson: Just his opinion as an expert.

The Court: In the Federal Courts experts are very limited in their scope. Even a doctor, for instance, in cases involving total and permanent disability can say a man cannot work, but he cannot say a man is totally disabled.

This man can give his opinion as to what he found, but to ask him the question in the form in which you have asked it is to invade the province of the jury. If he found structural defects and the like, he can describe them, he can tell about them. He can tell what he found. It may have the same result, in the last analysis, as a direct question. You are not allowed to ask the direct question. That was settled long before I came on this bench

(Testimony of Gough L. Cheney.)

in the famous case known as *Stephens v. United States*, 73 Fed. (2d) 695, which involved the question of doctors' testimony.

Mr. Olson: I will strike the question.

The Court: I know in the State Courts they are allowed greater latitude. We are not bound by the rules as to experts in the State Courts.

Mr. Olson: I will take your Honor's suggestion.

Q. (By Mr. Olson): I will ask you if, on the basis of your examination, you found any structural defects on this arm, this panel raiser head? [130]

A. Yes.

Q. Describe them.

A. The defects which I could see after the arm broke on the upper member, there were a series of shrinkage cracks or blow-holes or imperfections in the metal. Those apparently reached the inner surface of the arm, so that they were visible from the exterior surface.

There are also some minor porosities visible on the machined surface of the upper arm. Those are the most outstanding things that can be seen on the arm.

The Court: That conclusion you arrived at from the visual examination?

The Witness: Visual examination plus microscopic examination of specimens obtained from the other fractured surface of the arm.

The Court: You did not give them any tensile tests?

The Witness: No, sir.

(Testimony of Gough L. Cheney.)

The Court: To see if they would stand a certain pressure and stress?

The Witness: No, I did not, because the amount of metal remaining in the broken arm is entirely too small for such tests, and also examination of the cutter shows that the arm adjacent to the broken arm has been bent back through an angle of approximately 35 degrees, so that that particular arm, at any rate, the metal was ductile enough it did not break on being bent back over that angle.

The Court: All right.

Q. (By Mr. Olson): Did you, in your examination, find any evidence that the arm which broke had struck a hard or metallic object before breaking?

A. In my opinion, I can't see anything on that broken arm to indicate it would have struck anything hard enough to break that off.

Q. Did you observe in your examination that the arm behind the broken arm is bent back?

A. Yes, sir.

Q. Did you form any opinion as to how that occurred? A. I did.

Q. Will you explain what your——

Mr. Callaway: Just a minute. That calls for speculation and surmise, as to how that occurred, without further foundation being laid, even from an expert.

The Court: That is an explanation of a physical condition that was found. That is in the realm of expert testimony.

(Testimony of Gough L. Cheney.)

Mr. Callaway: As to how it was bent back?

Mr. Olson: Yes.

The Court: Yes.

Q. (By Mr. Olson): Go ahead.

A. From examination of the tool which was attached to [132] the bent arm there is a piece broken out of the front of that cutter and there are also two marks on the under side which conform to the threads on one of the bolts in the broken arm, indicating to me that this arm went back and struck this part of the cutter, bending this arm back and breaking off this end of the cutter (indicating).

Q. On the second arm?

A. On the second arm.

Q. Do you have an enlarged photograph in your report of the screw marks on the broken blade of the bent cutter which you say was struck by the screws on the cutter that broke off?

A. I have.

Q. Will you show me that?

A. Yes. Here it is (indicating).

Q. As I understand this photograph, and so the jury can understand this photograph, this represents the blade of the cutter of this one that bent back; the one behind it, it fits in?

A. It fits in here and it is broken off (indicating)

Mr. Olson: May I show the jury this picture?

Mr. Callaway: You can offer it in evidence.

Mr. Olson: I tried to.

(Testimony of Gough L. Cheney.)

Mr. Callaway: Not the report.

Mr. Olson: I will offer this photograph in evidence. [133]

The Court: Detach it from the report.

Mr. Olson: I will offer all the photographs.

Mr. Callaway: I have no objection if the witness will identify what they are.

Mr. Olson: All right. I offer them all now.

Q. (By Mr. Olson): What does photograph No. 1 represent?

A. That shows the general appearance of the cutter as it was received by me, and also the fractured surface on the arm and blow-hole.

Q. By the way, is this blown up in any way, or is it the actual size.

A. No, it is slightly enlarged.

Q. Will you identify what is represented by photograph No. 2?

A. That is an enlarged photograph of the fractured surface, showing the large shrinkage cavity or blow-hole.

Q. No. 3 represents what?

A. It is the broken tool on the adjacent arm and the bolt which had the threads distorted from the broken arm.

Q. Photograph No. 4?

A. That shows the——

Q. Excuse me. It is designated "Photomicrograph No. 1."

A. Photomicrograph taken at 100 diameters, to

(Testimony of Gough L. Cheney.)

show inclusion and porosity in the metal at the fracture.

Q. In other words, photomicrograph No. 1 is a sample [134] of the metal at the point of fracture, at the blow-hole? A. Yes.

Q. And No. 2?

A. That is after action, to bring out the grain structure of the metal.

The Court: Is that porosity noticeable on any other portion of the structure, except the broken place?

The Witness: The greatest amount is in the vicinity of this fractured surface. There are also others to a lesser extent, which are visible on the bent arm. Even on the machined upper surface you can see where the small blow-holes or pockets existed in the metal. The other arm seems to be quite sound, so far as the visual inspection goes.

Q. (By Mr. Olson): Now, again, so the jury will understand that photograph, where the screw is shown, that shows where the screw of the broken arm fits into the blade of the arm behind the broken arm. Did you find the alignment——

A. They seemed to match exactly. In taking a photograph they were removed from the broken arm, so they could be put in position.

Q. What does that signify to you?

A. That that bolt was what hit that tool.

Q. In other words, that the part that broke, broke first, and it hit the blade behind the part that

(Testimony of Gough L. Cheney.)

broke? A. That is my opinion, yes. [135]

Q. Did you find any evidence that the part that broke, the arm that broke, the blade that broke, had struck any object before it broke?

A. I don't see any evidence, in my opinion. There are a few little marks on it. They don't appear to me to have been there before this thing was flying around and hitting all kinds of things.

Q. Is this the blade from the broken part (indicating)? A. It is.

Q. Did you find any marks on it, to indicate it had struck any object of any kind, a spike, or anything?

A. Yes, there are a few little marks on the cutter blade, but quite small. Under the microscope they seemed to have, in my opinion, to have come from the back side, rather than the front side.

Q. Which would have occurred when?

A. Probably after it was broke and flying around and hitting all this other metal.

The Clerk: Your Honor, are these photographs admitted in evidence?

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 6, 7, 8 and 9 in evidence.

(The photographs referred to were marked Plaintiff's Exhibits 6, 7, 8 and 9, respectively, and were received in evidence.) [136]

Q. (By Mr. Olson): From your examination of this panel raiser head, did you make any determina-

(Testimony of Gough L. Cheney.)

tions of what the original position of the cutters was before the accident?

A. I made an examination to determine whether there was any evidence that the upper member had moved.

Q. Was there any evidence that the upper member had moved? A. There was.

Q. What was that evidence?

A. Well, looking with a magnifying glass down through this little key slot, with the adjacent hole, it looks like the metal was rolled up and gouged out, pulled away from the keyhole. On removing the Allen nuts the bottom of them showed they had been dragged across the surface of the shaft.

Q. In other words, in layman's language, as I understand you, from the indications you have just described, it is your opinion that when this broke the top cutter turned as far as it did away from where the pins should have been?

A. Yes. Without having removed it—I couldn't see, but the evidence is it moved the distance from this hole (indicating), where this hole is now, to the key slot. And also that distance is the same as the Allen screws are displaced from the flat——

The Court: What, in your opinion, caused that

The Witness: When the broken cutter hit the arm with such force to bend that arm back through about 35 degrees.

The Court: That is what caused it?

(Testimony of Gough L. Cheney.)

The Witness: That is my opinion, yes, sir.

The Court: All right.

Q. (By Mr. Olson): Did you find any evidence of an abnormal condition of operation prior to this arm breaking?

A. I see no evidence, myself. I could attribute that to such a thing.

Q. There is no evidence of any abnormal operation?
A. No, sir.

Q. Did you find any evidence of any abnormal installation?

A. Nothing that is visible to me, with what I have before me.

Q. Did you compare the chemical composition—by the way, what is that cutter, the part where it broke? What is it, what material is it made of?

A. Examination of and analysis indicates cast steel.

Q. It is of cast steel?
A. Yes.

Q. Any alloys in it?

A. I couldn't find any.

Q. What is the significance of an alloy in steel?

A. Well, there are two types of steel, the plain carbon [138] steel and there is an alloy steel.

Q. This is a carbon steel?

A. Plain carbon steel.

Q. Which is stronger?

A. As a rule the alloys are added to give greater strength to steel.

Q. You found no alloys at that place of break?

(Testimony of Gough L. Cheney.)

A. No.

Q. Did you find any alloys anywhere in it?

A. No, I did not.

Q. You compared the chemical composition of that arm which broke at the point of break?

A. I would have to refresh my memory.

Q. I will ask you, did you compare the chemical composition of this steel, cast steel, with the chemical composition of the lower arm?

A. I did.

Q. What was that? What did you determine from that comparison as to the chemical composition in both arms?

A. I would have to refer to my notes.

Q. Go ahead. There it is (indicating).

A. The analysis of the upper, the cutter arm or the upper member, from samples taken right in the vicinity of this porosity or blow-holes, right close to the fractured surface showed carbon .24 per cent, manganese .55 per cent, [139] phosphorus .72 per cent, sulphur .067 per cent, silicon .23 per cent.

Then samples were drilled in the lower member, in one of the arms immediately below this other one, and gave the following analysis: carbon .24 per cent, manganese .52 per cent, phosphorus .039 per cent, sulphur .042 per cent, silicon .31 per cent.

Q. I don't know as the jury remembers those figures as given. The upper cut or the broken part, the part we are complaining about, had the same amount of carbon?

(Testimony of Gough L. Cheney.)

A. It had .55 per cent manganese as against .52 for the lower arm.

The Court: You can argue that when the case goes before the jury.

Q. (By Mr. Olson): I will ask you this——

The Court: If you want to put it on a black-board, if you want the jury to see it, you can do that tonight and they can see it tomorrow. You can show the difference in figures tomorrow when you argue the case.

Mr. Olson: Strike that.

Q. (By Mr. Olson): What is the purpose of manganese, phosphorus, sulphur, silicon? What is the effect of that on cast steel?

A. All steel has more or less manganese in it, but steel normally only contains a maximum of about .05 phosphorus [140] and .05 sulphur, or less. When the sulphur and phosphorus gets higher than that it is usually considered to be out of standard specifications.

Q. What is S. A. E. steel?

A. Society of Automotive Engineers.

Q. Is that a standard for steels?

A. Yes, it is a grading.

Q. Did you find in your analysis which you just read that the cast steel at the point of the break there was S. A. E. steel?

A. No, because the phosphorus and sulphur are out of the required limit.

Q. Was the lower arm S. A. E. steel?

(Testimony of Gough L. Cheney.)

A. No, sir; it is O. K.

Q. What is the effect on cast steel of phosphorus and sulphur? A. It could make it brittle.

Q. Now, where did you find the weakest point of this panel raiser head arm to be?

A. Mechanically the point that would take the greatest load is right where it broke.

Q. Where it broke. What point, if any, on the portion of where it broke would take the greatest stress?

A. Approximately at the fractured surface. That is the greatest leverage. [141]

Q. Where the blow-hole is? A. Yes, sir.

Q. Did you measure the depth of the blow-hole?

A. No. It is about half an inch deep.

Q. In answer to some of the questions by the court I think maybe you answered this, but I want to ask it again: In you opinion were those blow-holes and the excessive porosity in that cast steel discernible to the naked eye before the arm broke?

A. Yes, I think fairly careful inspection would have shown them.

Q. And not even necessarily tests?

A. Yes. I think those cavities in the broken arm could have been seen.

Q. With the naked eye? A. Yes.

Q. Without a microscope? A. Yes.

Q. Was that casting painted after it was milled?

A. It is painted. I don't know when.

Q. It couldn't be painted and then milled? It is painted, is it not? A. It is painted.

(Testimony of Gough L. Cheney.)

Q. In your opinion were the blow-holes and excess porosity in that arm more discernible or less discernible [142] after it was painted or before it was painted?

A. The paint filled up some of the porosity.

Q. In other words, while it was being machined and not painted the blow-holes would be more apparent to the naked eye than they are now?

A. In my opinion.

Mr. Callaway: That is argumentative.

Q. (By Mr. Olson): I am just asking is that a fact?

A. Yes, I think they would be more apparent.

Q. Would you point out to the jury where those blow-holes and where that porosity is apparent to the naked eye?

A. Well, examination of this broken arm in the vicinity of the fractured face, you can see these blow-holes are where they come to the surface on the inner side. There are none apparent on the outer side. But then over on the arm, over here (indicating), that is bent. You can see them on the machined surface as well as down here in this bend (indicating).

Those blow-holes here on the inner surface have, in my opinion, weakened the metal at that point, just the same as if you nicked a piece of metal or wood and then bent it in that direction (indicating). The same way as when you cut a selvage of cloth, and tear it, it tears easier after that has been done.

(Testimony of Gough L. Cheney.)

In other words, it is my opinion if those blow-holes had [143] been on the outside they wouldn't have near the effect they had on the inside.

Q. In your examination did you find that the arm broke off sharp or that it bent?

A. The broken arm seems to be quite a sharp fracture.

Q. Like that (indicating)? A. Yes, sir.

Q. Did you find that the arm that was struck with the piece at the broken part bent?

A. Yes, it bent quite a bit.

Q. Did you form an opinion as to the effect of the blow-hole at the point of break, that is, what percentage it weakened that particular arm?

A. I figured out approximately the amount of area that was occupied by the blow-holes and porosity.

Q. What was your finding?

A. I would have to refresh my memory.

Q. You may?

A. All told approximately 17 per cent of the area of the fracture consisted of porosity, blow-holes.

Q. Which would weaken after 17 per cent?

A. It might be considered that way, but the position of the blow-holes is much more important than the average area—relative area.

Q. What was that position? How important was the [144] position of that blow-hole and that porosity to the strength of that arm?

A. I think the porosity on the inner side of

(Testimony of Gough L. Cheney.)

that casting in there was very important. Just as I say, if the force went in that direction it would make it tear and break easier.

Q. Let me ask you a question, Mr. Cheney, which might seem a little simple: Blow-holes in cast steel tend to make it weaker?

A. It is just that much less metal. I would say it would make it weaker.

Q. In other words, you would say that any blow-hole will weaken the metal?

A. Oh, well, just in that proportion it is the same.

Q. In proportion to the number and size?

A. The same as the actual metal that exists.

Q. Is cast steel apt to segregate when it is cast?

A. It often occurs, yes, sir.

Q. What does segregation in steel do to the steel?

A. It forms a condition like we have here in this broken arm (indicating).

Q. Would you say, then, there is segregation in that casting?

A. There is right at that point.

Q. It was visible to the naked eye? [145]

A. After it broke, yes.

Q. What do you chemists mean when you say, "locked-in stresses"?

A. Internal stresses that exist in the metal that haven't been relieved, so that it can't support the load it might have if the stresses had been relieved.

(Testimony of Gough L. Cheney.)

Q. Is there a method of relieving locked-in stresses?

A. Yes. Castings are usually annealed.

Q. What do you mean by "annealed"?

A. Heated up to the point that those stresses are dissipated.

Q. In your opinion were any internal or locked-in stresses completely relieved in the raiser head, based on your examination?

A. At that point where the fracture occurred the structure indicates that the casting was not completely annealed.

Q. What tests are there to determine whether blow-holes or porosity exist in a cast steel, other than if it is visible to the naked eye?

A. Take an X-ray of it.

Q. Would that show porosity and blow-holes?

A. Yes, if they are large enough.

Q. What do they mean, or what do you mean by "large enough"?

A. Large enough so that they could be photographed. [146]

Q. In your opinion would an X-ray show that blow-hole?

A. Oh, it would show that big one easy.

Q. Easily? A. Yes.

Q. What do they mean by a microgram?

A. Just a picture taken through a microscope.

Q. Would that reveal blow-holes?

A. No, sir.

(Testimony of Gough L. Cheney.)

Q. Are there any other ways to determine the existence of blow-holes, porosity, segregation than X-ray?

Mr. Callaway: I object to that, if your Honor please, as being immaterial. The mere existence of other measures is not the test, in a case of this kind, as to what is reasonable inspection. No foundation has been laid for this witness to so testify.

The Court: He has already testified to some of it, and there was no objection.

Mr. Callaway: I didn't object to it.

The Court: I think in view of that fact I will allow the question to be answered.

However, I am going to tell the jury that the question of the existence of that does not necessarily mean that has to be followed in this case. The question is whether such reasonably should be followed by a manufacturer. In other words, a manufacturer is not required to take every piece of [147] steel he puts out and put it under an X-ray machine. It would make steel much more expensive than it is now.

It is for you to determine ultimately whether there was a failure to take such precautions and make such tests as a manufacturer ordinarily would follow, under these circumstances.

With that modification——

Mr. Olson: Will you add another modification?

The Court: What is that?

Mr. Olson: That the reasonability of the test is

(Testimony of Gough L. Cheney.)

also based upon the use to which the thing is to be put.

The Court: That is right. And it is to be determined by the jury as to whether it is reasonable in the particular case.

With those modifications, you may answer the question. The question is, are there other tests, other than the X-ray test you were speaking about?

The Witness: Yes, there are other tests, such as what they call magniflux. That is usually used on forgings and articles of that type, to show cracks which are too small to be visible to the naked eye.

I think a casting of this nature, to visually show by visual inspection, to show a surface porosity, or X-ray, would be the only ones I know of to be used without destroying the casting. [148]

Mr. Olson: I think that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Callaway:

Q. Mr. Cheney, were you told when you were given these circumstances that this device was revolving at 7200 revolutions per minute?

A. I don't recall that I was told what the r.p.m. was they were using at the time.

Q. Well, let's assume that the arm in question was struck by a piece of wood. That wouldn't necessarily leave any physical evidence of its having been struck, would it?

(Testimony of Gough L. Cheney.)

A. No. I assume that was the purpose of the cutter, was to——

Q. I am not talking about the cutter. I am talking about the arm. A. The same.

Q. As a matter of fact, it is just as consistent that this arm struck some object and that the slipping around on the shaft took place, until the arm reached its tensile strength, and then it broke, isn't that right?

A. No, I don't agree with that, from my viewpoint, my opinion.

Q. All right. Now, you don't know which took place first, do you? [149]

A. I have an opinion.

The Court: Go ahead and give your opinion.

The Witness: The broken arm broke first.

Q. (By Mr. Callaway): All right. Now, it isn't unusual to find blow-holes in cast steel, is it?

A. No. It occurs quite frequently.

Q. As a matter of fact, you can hardly cast steel without creating some blow-holes, isn't that right?

A. It could happen.

Q. There is no such thing as perfectly annealed steel, is there? A. Relatively, there is.

Q. I mean actually.

The Court: The type used in the manufacturing of this kind of instrument.

The Witness: At the high speed a tool like this——

(Testimony of Gough L. Cheney.)

The Court: Yes. We are not talking about precision instruments which are manufactured of a different kind of steel. We are talking about this kind.

The Witness: The only way I could answer that is that a tool of this type that operates at that high speed shouldn't have any imperfections in it.

Mr. Callaway: I move to strike that answer.

The Court: That is a conclusion. I will strike it.

The question was whether porosity of that kind does not [150] occur in steel which is used for this type of instrument. This is a cast steel, is it not?

The Witness: Yes, sir.

The Court: It is not the precision instrument type which requires a special steel?

The Witness: It is not a forged steel.

The Court: That is right.

The Witness: I hardly know how to answer that. I have never seen a high-speed tool like that, that was broken from some other cause, that showed porosity.

The Court: I see. All right.

Q. (By Mr. Callaway): Well, we are talking about high-speed tools that are made to cut steel. This was made, you understand, to cut soft wood.

A. I mean high-speed of the r.p.m.—going around several thousand times a minute.

Mr. Callaway: That is all.

The Court: You exclude all possibility that that break may have been caused by some piece of wood coming in contact with the cutter?

(Testimony of Gough L. Cheney.)

The Witness: In my opinion, I don't see how a piece of wood could have struck that, because the whole arm is covered by the tool itself.

The Court: All right. Any redirect examination?

Mr. Olson: Yes. [151]

The Court: The cross-examination has been very limited. I am going to limit the redirect examination. Do not bring in any new matter.

Mr. Olson: The cross-examination went to the material in that casting and metal used in the casting.

Mr. Callaway: Not a word, except was it ordinary cast steel.

Redirect Examination

By Mr. Olson:

Q. In your opinion, is ordinary cast steel the proper steel to be used in instruments of this type?

Mr. Callaway: I object to that, no proper foundation having been laid.

The Court: The objection will be sustained. There is no showing a special kind of steel was ordered. You carry the doctrine beyond limits here. You make them guarantors. The courts have refused to do that.

The objection will be sustained on all possible grounds. This is not proper redirect examination.

Mr. Olson: I am not trying to be improper, your Honor.

(Testimony of Gough L. Cheney.)

The Court: I know. I am using the word in the ordinary sense. It is not material inquiry. It is not a subject which is germane to the issues here.

When I try to use an ordinary dictionary word you resent it. It shows how words become a pattern. We are used to [152] using the words "incompetent, irrelevant and immaterial." I do not mean you are asking improper questions. I mean a proper subject to inquire into.

Mr. Olson: I have no further questions.

The Court: All right.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.)

The Court: Do you have any doctors here?

Mr. Olson: I certainly have.

The Court: We will put them on.

Mr. Olson: I have run out of witnesses.

The Court: I want to warn you, since this is the first time you have been here, to never do that. If you do, you are going to work Saturday. You are not in the Superior Court. You do not limit your witnesses here, or sometime you will find yourself in the position of where you cannot go on and I will ask the other side to go on. I control the hours in this court.

Mr. Olson: I understand, your Honor.

The Court: You should have had those witnesses here. We could easily put through one doctor. This

case has to be finished tomorrow, otherwise we will work Saturday morning.

Mr. Olson: I wanted to discuss that with you, your Honor, as to the doctors. The doctors are not available. [153]

The Court: The doctors will have to be here whether they are available or not. They will have to be here tomorrow morning at 10:00 o'clock. Doctors are subject to subpoenas, just like anyone else.

Mr. Olson: I will have one here at 10:00 o'clock tomorrow morning.

The Court: We try to accommodate them by putting them on out of turn, out of order. I will not stop the trial of the case to wait for a doctor.

Mr. Olson: I am not asking you to.

The Court: This case was set, and I gave you a definite day. I continued it to Thursday, with the understanding we would be through. I worked very long hours in the other case to finish.

I am not going to lose any time tomorrow. I am giving your warning—both sides—if the case is not finished tomorrow we will work Saturday.

Mr. Callaway: I understand.

The Court: Otherwise, we will have to go to Tuesday, and that is too long. If we finish the taking of testimony and the arguments I might change the technique and instruct the jury Monday. I will determine that later on. Do not make any week-end engagements.

Now, ladies and gentlemen of the jury, we are about to take an adjournment to tomorrow morning

at 10:00 o'clock. [154] You are admonished not to converse among yourselves or with anyone else on any subject connected with the trial, or to form or express an opinion thereon until the case is finally submitted to you.

You have heard only one side of this controversy, and you should keep your minds open, because you are not in a position to form any inference or any conclusion as to any fact in this case until all the evidence is in and you have been instructed by the court as to the legal principles which apply.

You will find this case involves a very, very technical problem of law, as to which you will have to be instructed very, very fully before you analyze the facts which are proven in this case. The defendant has not had his say as yet. There is testimony to be offered in their behalf, oral testimony, and I understand some depositions are going to be read. Until all the evidence is in, keep your minds open and do not form any conclusions as to the ultimate facts, as to whether the plaintiff is or is not entitled to recover, or as to any of the facts in the case.

When you return in the morning go to the jury room and we will call you when we are ready.

(Whereupon, at 5:20 o'clock p.m., Thursday, February 16, 1950, an adjournment was taken until 10:00 o'clock a.m., Friday, February 17 1950.) [155]

Los Angeles, California,
Friday, February 17, 1950. 10:00 A.M.

The Clerk: No. 9134-Y, William J. Byrne v. Woodworkers Tool Works, a corporation, for further trial.

The Court: Let the record show the jury is in the box. Proceed.

Mr. Olson: With your Honor's permission, may I call Mr. Byrne to the stand for about two questions?

The Court: Yes.

WILLIAM J. BYRNE,

the plaintiff herein, recalled as a witness in his own behalf, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Byrne, since your accident did you keep any records of your own making concerning medical bills paid or owed by you since this accident?

A. Yes, sir.

Q. Have you since yesterday's court session had occasion to refresh your memory with those notes?

A. Yes, sir.

Q. Will you tell us, to the best of your knowledge, what medical bills are now owed by you or have been paid in [157] your behalf to date?

Mr. Callaway: I object to that at this time on the ground no proper foundation has been laid. I as-

(Testimony of William J. Byrne.)

sume that the doctors are here and they are the ones to testify.

The Court: The amount he paid is one element. They can testify as to whether they were necessary. Overruled.

Q. (By Mr. Olson): Answer the question.

A. To the best of my recollection I owe between \$350.00 and \$400.00.

Q. Medical bills? A. Medical bills.

Q. Have you refreshed your recollection concerning the time you actually lost from employment as a result of this accident?

A. The time that I lost——

Q. Answer yes or no. A. Yes.

Q. Will you tell what that time is now?

A. It is eight months, almost eight months and a half.

Q. Do you know what your average weekly earnings were just before the accident?

A. My average weekly earnings were \$64.00.

Mr. Olson: That is all. [158]

Cross-Examination

By Mr. Callaway:

Q. Mr. Byrne, you returned to work on the 10th of January, 1949? A. Yes, sir.

Q. You worked to the 1st of February?

A. Yes, sir.

Q. As a helper? A. Yes, sir.

Q. At the same rate of pay? A. Yes, sir

(Testimony of William J. Byrne.)

Q. What you did during that period of time was to move things around, isn't that right? You didn't attempt to operate any machine?

A. No, sir.

Q. What was there about the duties of a helper that you couldn't perform during that period of time?

A. I was unable to lift the doors on and off of sanding tables. I was unable to hold——

Q. I am not talking about in connection with the operation of any machines. You weren't attempting to do that. I am talking about the work that you went back there to do as a general helper.

A. Well, it was moving doors and assisting people in moving objects like doors and door panels. [159]

Q. What was there about your condition that prevented you from doing that?

A. I had no grip in my hand. I was not able to hold any quantity in my hand, pieces of wood.

The Court: Do you have any more grip in your hand at this time than you did then?

The Witness: The doctor has not examined me lately.

The Court: I did not ask you that. I asked if you had any more grip now than you had then?

The Witness: Not very much, sir.

Q. (By Mr. Callaway): Is it your testimony that you can't pick up anything with that hand and lift it?

(Testimony of William J. Byrne.)

A. To a limited extent I can lift it, sir. I can lift a book.

Q. You have calluses on your hand, I notice. What do you do to get those?

A. Well, I have to do a certain amount of work in order to pay my living expenses.

Q. I didn't ask you that. I asked you what you did to get the calluses on your hand.

A. Oh, worked in my yard.

Q. Anything else?

A. Oh, occasionally I do something else. I will dig or something like that.

Q. Sir? [160] A. Occasionally I will dig.

Q. When you say work in your yard, do you mean with a rake and hoe and spade?

A. Yes, sir.

Q. What is there about this work of yours in tree surgery that you can't do?

A. In doing cavity work and so forth I am not able to use my hand in using a chisel or a hammer. I am not able to hold certain types of power equipment that is necessary in the work. I am not able to hold a rope in my hand.

Q. Now, actually, when did you go into the tree surgery business? A. About the 1st of July.

Q. What is it?

A. About the 1st of July, 1949.

Q. Did you spend any time between February 1st and July in training yourself for that?

A. No, sir.

(Testimony of William J. Byrne.)

Q. You hadn't ever had any experience along that line before, had you?

A. I had done quite a bit of studying from books and through knowledge I had learned from other people.

Q. Actually, you have been making \$300.00 to \$400.00 a month in that business, which is more than you were making at the time you were working as a mill worker, isn't that [161] right?

A. No, sir. At the time—may I explain, sir?

The Court: Go ahead.

Q. (By Mr. Callaway): Yes.

A. At the time that I gave your assistant that figure——

Q. You mean Mr. Lopardo here (indicating)?

A. Yes. ——that was my gross. Out of that I had to pay my expenses and living, and so forth.

Q. Well, you remember when your testimony was taken in Mr. Olson's office, your attorney, on the 21st of November of last year by Mr. Lopardo?

A. Yes.

Q. At that time you were given the following explanation, were you not, and I am reading on page 2, lines 10 to 26, inclusive, and lines 1 and 2 on page 3. This is Mr. Lopardo speaking:

“Probably your counsel has explained to you the nature of a deposition. However, to clarify it for the purpose of the record, please be advised that pursuant to certain sections of the Federal Law of Civil Procedure the defendant is entitled to ques-

(Testimony of William J. Byrne.)

tion you under oath as to certain matters concerning the allegations in your complaint.

“Though this proceeding appears to be informal, it actually has all the solemnity of a court proceedings. [162]

“After the questions are propounded and your answers given, they will be taken down by the reporter, typed up and put in pamphlet form, after which they will be submitted to you for reading. At that time you may make corrections, if you so desire. At the time of trial, however, if you do make any corrections, I will be entitled to ask you why you made those corrections.

“Therefore, to avoid that, in the event I ask any questions that are not clear to you, or you do not understand, or you do not hear, please ask me to repeat them or rephrase them so you can understand them. Is that clear?

“A. Yes.”

Then starting on page 3 at line 21:

“Q. Would you give us a rough approximation of your weekly intake, your earnings?

“A. Well, I would like to clarify it in this manner: I have only been in business a few months, and due to output of expenditures, my own personal income has been cut down to practically nil outside of living expenses.

“Q. I am not trying to pin you down to dollars and cents. Could you give us an approximation of your weekly income? [163]

(Testimony of William J. Byrne.)

“A. Well, it will vary from one hundred to several hundred.

“Q. Well, would you strike an average? You say you have been in business a few months now, and apparently you are earning money. Now, will you tell us how much you make on the average?

“A. On an average gross, \$200.00.

“Q. You have, however, brought in more in business than \$200.00, haven't you?

“A. Yes.

“Q. How high have you gone?

“A. Well, I can't possibly say offhand, without looking.

“Q. A rough approximation will do.

“A. Oh, \$350.00 to \$400.00.

“Q. Per week?

“A. Yes.”

Is that your testimony? A. Yes, sir.

Q. What prevented you from working at some type of work, Mr. Byrne, from the 1st of February to the 1st of July, 1949?

A. I spent quite a bit of time going from one mill to another, to different lumber companies, and so forth, trying to secure a position in that line of work and a position which I was able to do. [164]

Q. This law suit was filed on the 21st of January, 1949, is that right?

A. To the best of my knowledge.

Q. Does that have anything to do with your leaving your work on February 1st?

(Testimony of William J. Byrne.)

Mr. Olson: I object to that question.

The Court: He has a right to answer that. Overruled.

The Witness: No, sir.

Mr. Callaway: I think that is all.

Mr. Olson: Two questions.

Redirect Examination

By Mr. Olson:

Q. As a matter of fact, Mr. Byrne, you didn't leave your work on February 1st, you were laid off?

Mr. Callaway: Just a moment. That is leading.

Q. (By Mr. Olson): Did you voluntarily quit your work on February 1st, from Selby Company?

A. No.

Mr. Callaway: I object to counsel asking a leading question and educating the witness, and following it with one that is possibly proper.

The Court: The objection will be sustained.

Q. (By Mr. Olson): Why did you leave your work on February 1st, Mr. Byrne?

A. They let me go because due to my injury I was not [165] able to carry on the work that I was supposed to do, and I was holding up other men from their work. It was not up to the standard that I had done before.

Q. Hold your right hand up, Mr. Byrne, and make a fist.

(Witness complies.)

(Testimony of William J. Byrne.)

Q. Is that the best you can do with your little finger? A. Yes (indicating).

Mr. Olson: That is all.

Mr. Callaway: I have nothing further.

The Court: All right. Step down.

(Witness excused.)

Mr. Olson: I will call Dr. Sutherland to the stand.

DR. ROSS SUTHERLAND,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Ross Sutherland, M.D., 1332 Wilshire.

Direct Examination

By Mr. Olson:

Q. What is your business or profession, Dr. Sutherland?

A. Traumatic and orthopedic surgery.

Q. Are you licensed to practice medicine in the State of [166] California?

A. That is correct?

Q. How long have you been so licensed?

A. Since 1920.

Q. What schools have you graduated from and what degrees do you have?

A. Stanford of Southern California.

(Testimony of Dr. Ross Sutherland.)

Q. Medical School? A. That is correct.

Q. What degrees have you obtained?

A. M.D.

Q. You specialize in some branch of medicine?

A. In traumatic and orthopedic surgery.

Q. What does it mean?

A. Those are conditions as a result of direct trauma.

Q. Trauma means what?

A. Break and contusion of the tissues.

Q. By outside source.

A. By outside source.

Q. To the layman repairing injuries?

A. That is correct.

Q. Did you ever have occasion to examine William Byrne, the plaintiff in this action?

A. I examined him on November 25, 1949.

Q. Where was this examination held? [167]

A. It was made at my office.

Q. When you made this examination did you obtain a history of the patient's injury?

A. I did.

Q. What was that history?

A. The patient gave the following history, that on October 28, 1948, a steel casting broke, cutting tendons of the patient's right hand on the surface. An operation was performed on the hand by Dr. Detwiler of Burbank.

Q. Did you then make an examination of Mr. Byrne's hand? A. I did.

(Testimony of Dr. Ross Sutherland.)

Q. Will you describe what method you used in making this examination?

A. Well, the examination was a typical clinical examination and radiograph picture, and X-rayed the hand and found a chip fracture off the head of the fourth metacarpal—

Q. Stop there. What is the fourth metacarpal?

A. That is the bone from the wrist down to the first joint of the finger.

Q. Thank you. Continue.

A. This chip fracture had completely healed. There had been an injury to the flexure tendons of the fifth finger, which had been sutured.

Q. Just a minute. The flexure tendons are what? [168]

A. The tendons that bring the fingers down into the palm of the hand. There was also injury to the fourth finger over the metacarpal joint. This was repaired, except for a little weakness of the third phalanx.

Q. Did you find any abnormalities with Mr. Byrne's hand, as a result of your examination?

A. The examination revealed there was loss of flexion or the ability to bring the fifth finger down into the palm of the hand. The degrees of limitation of motion were as follows: Distal phalanx or the phalanx on the end, the extension or the ability to fully extend the finger was 160 over 180, or 20 per cent loss. Flexion of the distal phalanx was 0 over 90.

(Testimony of Dr. Ross Sutherland.)

The second phalanx, the middle one, extension 180 over 180; complete. Flexion was 0 over 90.

Metacarpal of this joint here (indicating), extension was 180 over 180; could get it fully straight. Flexion was 90 over 90.

The tip of the fifth finger failed to touch the palm of the hand by three inches.

Patient was advised to make repair of the flexure tendons in the fifth finger by surgery, which will require about a week's hospitalization, and about eight to ten weeks of further disability following surgery.

Q. Now, do I understand your testimony to be that you [169] recommend surgery be performed on this hand?

A. Unless it is performed on this hand the condition of the hand is permanent.

Q. What was your testimony regarding the loss of grip in that hand?

A. There is 25 per cent loss of hand grip.

Q. That will continue the rest of his life, unless reparative surgery is undergone?

A. That is correct.

Q. Will you explain to the jury what this operation consists of?

A. The operation consists of opening up the palmar surface of this fifth finger and approximating the tendon. It is a difficult job and should be done by a tendon specialist.

There may be some permanent disability even fol-

(Testimony of Dr. Ross Sutherland.)

lowing surgery, because it has been a long time since the tendons have been separated, in the proximal portion of this area of the tendon, if there is a point of severance retraction up into the direction of the wrist (indicating). There is also some slight hypesthesia or numbness of this finger, where the sensory nerve had been disturbed.

Q. You found that nerve had been disturbed in his hand?

A. He has a very small percentage of disturbance of sensation. [170]

Q. When a person receives a trauma or an injury, as Mr. Byrne did, the nature of it, is it apt to produce a numbing sensation of the hand at the time of the trauma?

A. Sometimes trauma will produce numbness of the part immediately at the time of the accident.

Q. What causes that?

A. That is due to disturbances of the sensory nerve being cut.

Q. How long can that numbness last?

A. Sometimes for hours or days.

Q. Is there any treatment for this type of injury, other than reparative surgery?

A. There is no other treatment that will approximate these tendons without surgery.

Q. Is there any—I will use the word advisedly—guarantee that reparative surgery will restore his hand to normal function?

Mr. Callaway: I object to that as calling for speculation or surmise.

(Testimony of Dr. Ross Sutherland.)

The Court: Overruled.

The Witness: I would say he would still have some residual permanent disability following surgery. It has been a long time since these tendons were injured or atrophied. They may be frayed. They may not repair within the period of time and there may be some residual weakness. [171]

Mr. Callaway: That is all speculation.

The Court: That is all right. Doctor, is the condition due to the incompetency of the surgeon who forgot to sew those tendons in a manner in which they should have been sewn?

The Witness: Definitely not, your Honor, because even perfect repair in a certain percentage of tendon cases will give way. It is a very difficult procedure, and even with the experts repairing them a certain percentage of failure occurs.

The Court: You say this would require not only a specialist, but a specialist within a specialty?

The Witness: Yes.

The Court: Isn't it likely that because the surgeon employed was the average run-of-the-mill surgeon that he may not have done the thing that your expert, plus expert, would have done?

The Witness: Well, no.

The Court: I know you gentlemen hesitate to answer that question, but this jury has a right to know whether this condition is partly caused by this man not getting the care he should have had, regardless of whoever is responsible for the failure to do it.

(Testimony of Dr. Ross Sutherland.)

The Witness: Your Honor, I don't know Dr. Detwiler. He may be a very expert man in tendons. As I tried to explain, [172] a certain percentage of cases done by experts are failures.

The Court: All right.

Q. (By Mr. Olson): How much does an operation of the type you recommend ordinarily cost?

A. Well, from a private standpoint I imagine specialists would charge this man anywhere from \$300.00 to \$500.00.

Q. How much hospitalization would be required?

A. Probably a week.

Q. In the hospital? A. Yes.

Q. How much permanent disability would you say the patient would have after that operation?

Mr. Callaway: I object to that as calling for rank speculation and conjecture.

The Court: It is conjectural. I will give the federal instructions as to experts to the jury. Overruled.

The Witness: Well, it may vary anywhere from five to ten per cent.

Q. (By Mr. Olson): I don't think you understood my question. What I meant to say—perhaps I didn't make it clear—assuming Mr. Byrne had this operation, how long would he be incapacitated because of the actual operation, from doing anything?

A. As I stated, maybe eight to ten weeks.

Q. That is what I was after. And that operation, as you state—I want to be sure I understand

(Testimony of Dr. Ross Sutherland)

it and the jury does—would require cutting into the hand? A. Oh, very definitely.

Q. When they cut into the hand, what would they do?

A. Well, they would bring the tendons down and proximate end to end. If the upper part of the tendon is too short, the tendon man may have to take a piece of tendon from one of the other tendons and graft it together. You can't tell what the degree of operation is in there until you get into it.

Q. Let me ask you this, Doctor: Would an injury to the tendon of the little finger tend to impair the functioning of the finger next to it?

A. Well, this man had some minor injury to the fourth finger. With the fifth finger's inability to make a full hand grip, there is a little disturbance in the grip, but it is minor. Minor disturbance of the fourth finger tendon, in reference to hand grip, the fifth finger produces somewhat of a slight block.

Q. That is what I wanted to know. A. Yes.

Mr. Olson: I think that is all.

Cross-Examination

By Mr. Callaway:

Q. Doctor, at the time you saw Mr. Byrne on November 25, [174] 1949, he wasn't wearing a cast, was he? A. No cast.

Q. He told you that he was disabled from October 28, 1948, to February 14, 1949?

A. Correct.

(Testimony of Dr. Ross Sutherland.)

Q. He then worked two weeks but then was off until May, 1949, is that right?

A. That is correct.

Q. In other words, as he recited those facts you took them down? A. That is right.

Q. Now, the only fracture that he received was a chip fracture on the fourth finger, isn't that right?

A. I have forgotten just which one, fourth or fifth, but, anyway, the check-up X-rays I made showed it had completely repaired.

Q. Healed? A. That is right.

Mr. Callaway: That is all.

The Court: All right.

Redirect Examination

[By Mr. Olson:

Q. Did your examination disclose whether that fracture went through the joint of the bone or just the bone?

A. No. My examination didn't disclose that, because I [175] didn't have the original X-rays for comparison.

Q. You didn't see the original X-rays?

A. No.

Q. You had just the ones you took when you examined him? A. That is correct.

Mr. Olson: That is all.

The Court: Step down.

(Witness excused.)

Mr. Olson: Your Honor, may we approach the bench?

The Court: Yes.

(The following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Olson: I was unable to get hold of Dr. Detwiler until 9:30 last night. He has an emergency tonsillectomy, and two others. He said he would get here as close between 10:30 and 11:00 as he could make it. Mr. Callaway will stipulate the minute he walks in I can call him.

Mr. Callaway: I have no objection to that.

The Court: You will have to rest.

If you are going to make a motion, I want you to make it so we will not be losing time.

Mr. Callaway: I will agree if the motion is not acted upon favorably he may put him on out of order.

The Court: It just does not relate to liability? [176]

Mr. Callaway: No.

The Court: I try not to be unreasonable in these matters.

Mr. Olson: I just want an understanding.

The Court: You know under what pressure I work. I do not want to wait for people to come in out of order.

Mr. Olson: It is my understanding that I am going to rest now, and I will put on Dr. Detwiler when he arrives.

(The following proceedings were had in the presence and hearing of the jury:)

Mr. Olson: At this time, subject to the stipulation of counsel, the plaintiff rests.

The Court: The question has arisen whether the motion you are about to make, Mr. Callaway, has to be made in the presence of the jury. I will hear it out of the presence of the jury.

Ladies and gentlemen of the jury, there are some legal matters that have to be taken up with the court before the defendant proceeds with the case. You will retire to the jury room, and we will call you.

May it be stipulated the usual admonition has been given to the jury?

Mr. Olson: So stipulated.

Mr. Callaway: So stipulated.

(The following proceedings were had out of the presence and hearing of the jury:) [177]

Mr. Callaway: Comes now the defendant Woodworkers Tool Works, a corporation, and moves this court for a judgment of nonsuit on the following grounds:—

1. That there has been no evidence introduced that the defendant manufactured the item in question.
2. There has been no evidence that the defendant sold the device to plaintiff's employer.
3. There has been no evidence showing a causal connection between the breaking of the device and

the injuries sustained by the plaintiff. Those are the grounds on which the motion is predicated.

The Court: I want to say this, gentlemen: I have given this subject a great deal of thought and I think the law on the subject is contained in the cases which have been decided since 1940, beginning with *Kalash v. Los Angeles Ladder case*, and the others.

Mr. Callaway: Your Honor, may I give you my views on that?

The Court: Yes.

Mr. Callaway: I am familiar with the case of *Kalash v. Los Angeles Ladder* you have mentioned, your Honor. I don't feel that the law of California is applicable for the reason that certainly if there was any negligence it must have happened in Illinois. It couldn't have possibly happened in Los Angeles.

The Court: It is not a question of where negligence [178] occurs. It is the question of where the suit is brought. This is a transitory action.

In the leading case on the subject, the case in New York, Judge Cardozo did not decide it according to the law of Illinois, but under the law of New York.

Mr. Callaway: There was an action filed in New York.

The Court: That is right. We will take judicial notice of the fact your corporation is a corporation of the State of Michigan. The negligence there consisted of the faulty construction of a wheel that came off.

Mr. Callaway: Here is an action filed in the Federal Court by a citizen of California against a citizen of Illinois.

The Court: That is right.

Mr. Callaway: Claiming that the defendant corporation negligently manufactured an article. It is my contention under——

The Court: *Erie v. Tompkins*.

Mr. Callaway: Yes.

The Court: No. You misinterpret that case.

Mr. Callaway: I may misinterpret it, but that is my interpretation.

The Court: I have lived with that case. We have had to abolish a whole branch of law.

Mr. Callaway: I want to speak to you just a minute about the proof in this case. Where is there any proof we even [179] manufactured it? Certainly from the evidence adduced by the court itself, regardless of which State the court decides to follow, there is no evidence in this case that there is any causal connection between this device breaking and the injury that this man received.

The court asked these questions itself. You asked the witness several times, "Now, are you certain that all that had happened was a click?" And he told you that he was, at the time he jumped down on the floor.

Now, he has the board there. I don't know what happened and I don't guess there is anybody that can reconstruct what happened. He had the board and he let the board go.

Here is a device whirling at 7200 revolutions per minute. If the board went up, naturally, when the board is down under the cutting edge that is one thing, but if the board flew up and hit one of these arms, then that is quite another thing. There is no evidence here, I don't think, on which the court should let this jury guess and speculate.

The Court: Let me give you an illustration of how things repeat themselves since I have been on the bench here. I thought of it last night.

The reason I asked that question was to try to find out what caused the injury. I do not know what caused it, and the evidence does not show what the direct cause was. However, this is the situation: If that click which was caused by the [180] breaking set in motion the group of events that resulted in his injury, in view of the fact the click was not an ordinary click but was brought on by what actually later developed was a break in the instrument or the object, they are liable for the consequent injury.

I will give you an illustration of a case tried here about seven or eight years ago. A woman went to the basement of Sears, Roebuck where they were selling hardware. She was buying a door. The doors were suspended on a rack, sideways. They were hung just the way you see clothes hung in these large clothing stores. As she touched one of the doors the rack gave way and the whole group of doors struck the floor. They did not strike her. But it frightened her and she backed away from them and, unfortunately, backed into a piece of ma

chinery which she could not see. She hurt herself in the usual place where women hurt themselves when they are hurt, that is, the sacroiliac region.

I am not going to say what the result of the case was, but I sent the case to the jury although there was no evidence whatsoever in that case of any direct relation between the two. She was not hit by anything. The unusual event caused her to react in a certain way, which an ordinary human being would react in, and the injury resulted.

In the case if the click were, as he said, an unnatural click, and set in motion the chain of events, the mere fact [181] we do not know whether he was actually cut by the flying pieces of steel or whether his hand was cut when he ducked—that is a good expression, although it does not sound very nice, but it expresses the situation—it is traceable to this untoward event.

The Supreme Court of California has said that expert testimony to the effect that a particular accident is traceable to faulty manufacture is enough to present a *prima facie* case.

Mr. Callaway: Yes, your Honor. But let me give you my views on that.

The Court: All right.

Mr. Callaway: Now, the court will have to hold, as a matter of law that the proximate cause or the thing that set the other matters in motion was a click.

Now, I don't know how the court could know that that click might not have been a small piece of steel in some of the wood he was working on.

The Court: I do not have to decide how I would hold. You are the one who asked for a jury. If you had wanted my reaction to the facts you did not need to have asked for a jury.

Mr. Callaway: This is a matter of law.

The Court: If you had wanted my reaction to the facts you did not need to ask for a jury. You asked for a jury and [182] you are entitled to their reaction and not mine.

Mr. Callaway: At this time I am entitled to have your legal ruling on the evidence, if the evidence is not sufficient to present a factual situation upon which the jury should pass.

The Court: I do not agree with you. I think, in the first place, we are bound by the law of California and the law of California as set forth in the latest cases on the subject, which I will read into the record in a minute, holds that the facts such as are presented here are sufficient to take the case to the jury.

I want to refer to the cases. I will cite the leading ones, all of which I have here.

The cases I refer to are: *Kalash v. Los Angeles Ladder Company*, 1 Cal. (2d) 229; *Dryden v. Continental Baking Company*, 11 Cal. (2d) 33; *Honey v. City Dairy*, 22 Cal. (2d) 614; *Escola v. Coca-Cola Bottling Company*, 24 Cal. (2d) 453; *Sheward v. Virtue*, 20 Cal. (2d) 410; and then the case from which both of you borrowed instructions, *O'Rourke v. Day & Night Water Heater Company*, 31 Cal. App. (2d) 364. I am citing that case be

cause, while a petition for hearing was not applied for, the Supreme Court has on several occasions approved it.

The *Gerber v. Faber* case, 54 Cal. App. (2d) 674, has language which I do not think the Supreme Court would approve. [183] For that reason I am not going to give any instructions that are based on it. My good friend and former associate, Judge Shinn, was making a lot of new law at a time when there was not any. He used language which the Supreme Court at the present time would not approve.

For instance, he intimates that if a man bought from a manufacturer the best product, that would be a defense. That is not the law as laid down by the Supreme Court.

In fact, the Supreme Court has specifically said in one of these cases, *Sheward v. Virtue*:

“Virtue Brothers received rough iron leg castings moulded to their own patterns by another firm. It is conceded that freedom from negligence does not inure to the manufacturer because it purchased parts from another which were defective.”

That contradicts the *Gerber* case, although the *Gerber* case was later. In *Gerber v. Faber*, 54 Cal. App. (2d), at page 680, it will give you my view, and that will also give you an indication of my view on the instructions.

Of course, when the case is closed, the evidence

is closed, before you argue, I shall indicate to you my action upon the instructions which you have submitted. What I have already stated is going to save time, because you will get an idea what I perceive the law to be. [184]

Mr. Olson: May I make two comments?

The Court: Just a minute.

Mr. Olson: Excuse me.

The Court: I will hear anything additionally you want me to add. I have not ruled as yet.

Mr. Callaway: I fail to see where there is any evidence, where the complaint alleges that we even manufacture it.

The Court: Our Circuit Court, unfortunately, has adopted the scintilla rule now. It never was the rule in this Circuit. In fact, I was congratulated once by Mr. Justice Miller, that fortunately the scintilla rule does not apply. With me as a guinea pig the Circuit Court deviated from that, and beginning with the Harvey case and other cases, they have held that practically a scintilla of evidence was enough.

Mr. Callaway: I don't think there is even a scintilla of evidence that we sold this article as alleged to the plaintiff's employer.

The Court: I do not think an issue is made of that.

Mr. Callaway: Yes, he alleges it and we deny it.

The Court: I think there is an inference to be drawn from it. If you want to rest, you have a good point. You had better rest, without putting in

any evidence. When you put in your evidence, you are going to supply it.

Mr. Callaway: I am going to put on evidence, because I [185] won't supply it. There is nothing in my evidence to supply it.

Mr. Olson: May I make a comment for the record?

The Court: Yes.

Mr. Olson: Counsel for defendant has said there is not even a scintilla of evidence that this part was manufactured by the defendant. I call attention to the answer of defendant on page 2, paragraph D:

“Answering the incorporated paragraph V defendant admits that it sells Champion panel raiser heads; that it partially manufactured said article, but alleges in this connection that it did not cast the said raiser head nor any part thereof.”

Mr. Callaway: Are you trying to talk the judge out of his ruling?

Mr. Olson: I want that for the record. It is admitted in the answer.

The Court: I thought there was enough of admission of manufacture to bring it into the case.

All right, gentlemen. We will take a short recess. We will then call the jury and you may proceed with the evidence.

(Short recess taken.)

(The following proceedings were had in the presence and [186] hearing of the jury:)

The Court: Let the record show the jury is in the box. Proceed.

Mr. Olson: Dr. Detwiler is in court now, your Honor.

DR. HOWARD F. DETWILER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Howard F. Detwiler.

Direct Examination

By Mr. Olson:

Q. Dr. Detwiler, it is very difficult to hear you back here, and the jurors might have difficulty. Keep your voice up as much as possible, will you?

A. All right.

Q. What is your business or profession?

A. I am a physician and surgeon, M.D.

Q. Are you licensed to practice medicine in the State of California? A. Yes.

Q. How long have you been a physician and surgeon? A. Since 1941.

Q. What schools have you attended and what degrees have [187] you obtained?

A. I attended the College of Medical Evangelists at Loma Linda, and I hold an M.D. degree.

Q. Do you specialize in any particular phase of medicine, Doctor?

A. I have not formally specialized in a residence.

(Testimony of Dr. Howard F. Detwiler.)

However, I have been particularly interested in industrial surgery.

Q. What do you mean by "industrial surgery"?

A. That means the care of cases resulting from injuries sustained while the patient is at work.

Q. Occasioned by trauma?

A. That is right, trauma or other causes, related to their employment.

Q. Have you ever had occasion to examine or treat William Byrne, the plaintiff in this action?

A. Yes.

Q. When was the first time you saw Mr. Byrne?

A. 28th of October, 1948.

Q. What was the occasion for your seeing him?

A. Mr. Byrne was brought into my office with a severe injury to his hand.

Q. Which hand? A. His right hand.

Q. Do you know what time that was? [188]

A. 9:00 o'clock he was injured. He was there about 15 minutes later, as I recall.

Q. It is your understanding he was in your office approximately 15 minutes after he was injured?

A. 10 or 15 minutes, yes.

Q. Was he bleeding? A. Yes.

Q. Did you make any examination of his injury?

A. I did.

Q. What did you determine his injury to be?

A. We detected a deep 4-inch laceration of his right hand which extended from the base of his ring finger in the distal part of the palmar surface

(Testimony of Dr. Howard F. Detwiler.)

around to the dorsal surface of the right small finger base (indicating).

Q. Will you explain that, using your hand as an example?

A. The laceration extended from the base of the ring finger around and to the dorsal aspect of the base of the small finger of his right hand (indicating).

Q. Did you obtain any history from the patient regarding the accident?

A. Yes. He stated that he had been working with a shaper and that something happened to the wheel, and that he received this injury as a result of that.

Mr. Callaway: Your Honor, I wish at this time to ask the court to instruct the witness the history a patient gives a [189] doctor is admissible for the sole purpose of being what he told the doctor and not the truth of the statement he made.

The Court: The court so instructs the witness. What took place has been testified to by the plaintiff himself. The doctor, in basing his diagnosis, must rely upon the origin of the ailment complained of and therefore he is allowed to say what the patient told him, but as to whether the facts the patient told him are true or not is for the jury to determine, on the basis of the evidence given by the patient himself in this case the plaintiff.

Q. (By Mr. Olson): What, if anything, did you do at that time, the first occasion Mr. Byrne visited you with this injury, to treat him?

(Testimony of Dr. Howard F. Detwiler.)

A. First of all, we stopped his hemorrhage.

Q. How?

A. By application of the usual hemostats to bleeding area.

Q. What is a hemorrhage?

A. Hemostat is a small pincers that controls bleeding.

Q. No. What is a hemorrhage?

A. Loss of blood. In this case from trauma.

Q. And what did you do, if anything?

A. We X-rayed the hand.

Q. Did you get a report from that X-ray?

A. Yes. [190]

Q. Will you tell the jury what the report was?

A. The X-ray showed a fracture—I will read the report, if I may:

“There is a fracture at the base of the third proximal phalanx on the medial aspect of the base.” That means this first finger (indicating). The medial aspect is the side toward the body, holding the palm this way (indicating).

“The structure of the skin and soft tissues is seen. The picture after surgery is made and shows the fracture extends into the soft surface, and the fragment is in good position.”

Q. Do you have those X-rays with you, Doctor?

A. Yes.

Q. Were these X-rays taken at the same time, both of them?

A. One was taken before and one after. Don't

(Testimony of Dr. Howard F. Detwiler.)

ask me which was taken when. I think I can tell you, though.

Q. We will wait for the shadow box.

A. I mean the same day, I understand they were taken.

Q. One before you treated him and one afterwards, is that right?

A. That is right. There are two views. An AP view. That is with the hand out in this position and the rays striking through the flat surface (indicating). [191]

Q. Is this the X-ray taken before surgery or afterward (indicating)?

A. To be very truthful, I read the report of our radiologist in our office, who reads all our X-rays; I am not absolutely positive?

Q. You don't take the X-rays?

A. My radiologist takes them.

Q. He interprets them?

A. The technician takes the X-rays and the radiologist reads them. We certainly read them. The reason I say I am not certain, even though Dr. Debb in his report mentioned it showed repair of soft tissue, I believe this is the one taken before and this is the one taken afterwards (indicating). However, there would be no way to prove it. That doesn't make any difference.

Q. Does the X-ray show a fracture of the distal phalanx?

A. No, I don't believe they do.

Q. Your report said there was a fracture?

(Testimony of Dr. Howard F. Detwiler.)

A. Proximal.

Q. Was there a fracture?

A. Yes, there was a fracture in the base of the proximal phalanx, extending from here to here (indicating). Equally well seen on this view, extending from here to here, proximal phalanx (indicating).

Q. The fracture went through the joint?

A. Yes.

Q. Is a fracture through a joint more serious than a fracture that doesn't strike a joint?

A. Yes.

Q. Why?

A. In this case particularly because longer immobilization is required. The longer you must immobilize tendons that are repaired the more likely you are of a permanently stiff and atrophied finger. And also, the likelihood of infection and permanent limitation of motion from the injury to the joint.

Q. As I understand you, in a layman's language, because the fracture went through the joint it would require a longer period of being immobilized?

A. Yes.

Q. Which, in turn, would affect the healing of the tendons?

A. That is true.

Q. That is what you mean?

A. That is right.

Q. You saw Mr. Byrne, you stopped the bleeding, you had X-rays taken of his hand. Then what, if anything, did you do?

A. We determined the degree of impairment of

(Testimony of Dr. Howard F. Detwiler.)

sensation [193] in his hand, indicating nerve injury, and also the degree of impairment of function of his hand.

Q. How was that done?

A. By having the patient flex his fingers.

Q. Could the patient flex his fingers?

A. He could not flex his small finger.

Q. Is that why you determined he had a severed tendon? A. Yes.

Q. What did you do then if anything?

A. We found it necessary to enlarge his wound by approximately a half an inch, in order to find the cut tendon end, which always retracts up into the arm. We united his tendon, using cotton suture.

Q. In other words, you sewed the tendon together? A. Yes.

Q. How big is a tendon of a little finger?

A. Approximately an eighth of an inch in diameter.

Q. You had to probe and find that?

A. Yes.

Mr. Callaway: Mr. Olson: will you keep your voice up?

Q. (By Mr. Olson): What is a compound fracture, Doctor?

A. A compound fracture is any fracture open to the exterior.

Q. Did you find Mr. Byrne had a compound fracture? A. Yes. [194]

Q. What did you do after you united the tendon?

(Testimony of Dr. Howard F. Detwiler.)

A. We attempted to unite the severed nerves, which is often a very difficult and sometimes well-nigh impossible job. But we always attempt to unite them with a suture. We then sewed up the deep tissues and closed the skin, and we applied a cast to his——

Q. Plaster cast?

A. Plaster cast to his hand and his forearm.

Q. What was the purpose of the plaster cast?

A. To immobilize both the tendon and the joint.

Q. How long was he in the plaster cast?

A. The cast was taken off the 27th of November.

Q. It was put on on the 28th of October?

A. Yes.

Q. So he was in the cast one month. Do you know how many sutures you took in Mr. Byrne's hand? A. Seventy plus.

Q. What do you mean?

A. We took at least seventy. That is what I have on my record.

Q. You took seventy or more sutures in his hand?

A. Yes. His hand was badly macerated. It wasn't just a clean cut, it was a macerated hand.

Q. I will ask you this, Doctor: Does injury to a tendon, as in this case the severance of a small finger tendon, [195] in any way affect the use of the tendon next to that? A. Yes.

Q. How?

A. Well, now, naturally they function in sym-

(Testimony of Dr. Howard F. Detwiler.)

pathy, they function together, usually, I mean, ordinarily in the function of the performance of a man's duties. Also, the immobilization naturally in the repair of a tendon would affect somewhat the adjacent tendon.

Q. Would it affect the nerves surrounding those tendons?

A. It would not affect the nerve unless the nerve was cut.

Q. Was the nerve of the small finger cut?

A. Yes.

Q. Severed? A. Yes, and macerated.

Q. What do you mean "macerated"?

A. Chewed up.

Q. When was the last time you saw Mr. Byrne's hand, except this morning outside of court?

A. I saw Mr. Byrne, I believe, a week ago today, on the 10th.

Q. Did you observe in that last examination whether Mr. Byrne's right finger is smaller than his left finger? A. I did.

Q. It was? [196] A. Yes.

Q. What causes that?

A. Two things. First of all, nerve injury. Atrophy of tissue, result of nerve injury.

Secondly, atrophy of disuse. In other words shriveling of the part because it isn't used properly

Q. Do you have a record of how many times Mr. Byrne visited your office for treatment?

A. Yes.

(Testimony of Dr. Howard F. Detwiler.)

Q. How many times does it disclose?

A. Twenty-five times.

Q. Do you know a Dr. Boyes? A. Yes.

Q. Who is Dr. Boyes?

A. Dr. Boyes is the leading hand surgeon in Los Angeles.

Q. Have you ever discussed this case with Dr. Boyes?

Mr. Callaway: I object to that as calling for hearsay.

The Court: That is merely preliminary.

Q. (By Mr. Olson): You say you have?

A. Yes.

Q. To your knowledge did Dr. Boyes treat Mr. Byrne after you did?

A. Dr. Boyes saw Mr. Byrne during the same period. Dr. Boyes consulted with him on the 21st of December, and I saw him several times after that also. [197]

Q. Did Dr. Boyes' diagnosis of Mr. Byrne's condition agree with yours?

Mr. Callaway: I object.

Mr. Olson: I will strike that.

The Court: That is a leading question.

Mr. Olson: I don't mean to ask a leading question.

The Court: Ladies and gentlemen of the jury, when a question is asked and the objection is sustained you are not to assume what the answer is going to be. It is as though you had not heard it at all.

(Testimony of Dr. Howard F. Detwiler.)

Q. (By Mr. Olson): Doctor, what do you doctors mean by temporary as distinguished from permanent disability?

A. Temporary disability is disability of short duration, which will improve in the normal event of Nature's healing. Permanent disability is the disability that patient will carry with him the rest of his life, depending on the degree of the injury.

Q. In your opinion, based upon your examination of Mr. Byrne, does he have a permanent disability? A. Yes.

Q. In your opinion would an operation on this hand be advisable? A. Yes.

Q. In your opinion should such an operation be performed by a specialist? [198]

A. Definitely so.

Q. Why?

A. This is one of the most difficult procedures that we have surgically to perform. In all probability if Mr. Byrne has a surgical procedure it will require tendon transplants. I say in all probability because I don't know exactly what the specialist will do. However, I do know what is done ordinarily. A small tendon is taken out of the forearm and the tendon is removed completely from this scarred area, and this new tendon is implanted into the finger. In other words, into the base of the terminal phalanx of the injured part. The tendon is cut here, and this is all new tendon we get around this scar tissue that caused a lot of disability in

(Testimony of Dr. Howard F. Detwiler.)

Mr. Byrne's case (indicating). Definitely he should have this procedure done, in my opinion.

Q. Do you know what the average expense of such an operation is?

A. That is a hard question to answer. It is an expensive procedure.

Q. How long a period of hospitalization is ordinarily required for a person that undergoes such an operation?

A. Not a long period of hospitalization.

Q. How long?

A. Two or three days, so far as the time in the hospital is concerned. [199]

Q. Would the hand be put in a cast?

A. Yes.

Q. How long ordinarily would the hand remain in a cast?

A. At least three or four weeks.

Q. Are those operations in your experience and knowledge always successful?

A. By no means.

Q. What is the usual result of such an operation?

A. That is a hard question to answer. I can tell you the ideal result.

Q. Yes.

A. I know that the function in this case would be greatly improved by an operation. To say that the function would be normal, that I very, very seriously doubt in this case. But the function would improve greatly, as far as the ability to flex the finger.

(Testimony of Dr. Howard F. Detwiler.)

Also, in this case there should be another attempted nerve repair. Now, the tissues have all healed. There is still numbness. In other words, there is still lack of nerve supply to the finger. That should be done at the same time.

Q. What is nerve repair?

A. The scarred ends of the nerves are isolated and the nerves are united.

Q. How large are nerves? [200]

A. Extremely small.

Q. Sewed together?

A. Sewed together they are about the size of an ordinary string.

Q. If I have asked this question somebody correct me. I don't think I have. Would a person who received such an injury as Mr. Byrne received experience a feeling of numbness immediately after the trauma? A. Yes.

Q. Why? A. Severance of nerves.

Q. In this case you testified the nerve was severed? A. Yes.

The Court: Doctor, could you tell from your experience in industrial surgery, where you deal with cuts and bruises and contusions and things like that constantly, what type of trauma caused this injury?

The Witness: That is a hard question, Judge to answer.

The Court: If it were easy, I would not ask it.

The Witness: I don't believe that that could be answered, except we know that it was a forceful injury.

(Testimony of Dr. Howard F. Detwiler.)

The Court: Could you tell it was a sharp instrument that caused it?

The Witness: It was not a knifelike blow. Not like when a glass—— [201]

The Court: Could it be caused by a piece of wood striking the hand, a piece of wood going at great velocity?

The Witness: You ask if it could be. Absolutely, it could be.

The Court: In other words, you cannot say that this was actually caused by metal coming in contact with a metal object?

The Witness: I feel in this case there is no question—I mean, it was the metal that caused it, but——

The Court: It was not the metal?

The Witness: It was the metal that caused it, but you asked if it could be a wood piece——

The Court: In this case you think the metal caused it?

The Witness: Yes. I don't think there is any question in this case.

The Court: All right. The reason I am asking is because the plaintiff himself could not tell what actually caused it, what his hand came in contact with that caused the injury. That is the reason I am asking you if you can make any deductions from the way it looked.

The Witness: We felt there was no question it was a metallic instrument that had caused this.

(Testimony of Dr. Howard F. Detwiler.)

Q. (By Mr. Olson): From your observance of the wound when Mr. Byrne came in, would it be a forceful impact? A. Yes. [202]

Q. Because of the shattering of the bone?

A. Yes.

Q. Because of the breaking of the bone?

A. Yes, and maceration of tissue.

Q. What do you mean?

A. Well, very vulgarly to describe it, chewed up; hamburger.

Q. Did Mr. Byrne complain of pain when you saw him? A. He did, indeed.

Q. Would you say he was in great pain?

A. No, I wouldn't. Trauma of this type doesn't produce great pain. It may produce shock, but usually trauma of this type——

The Court: Is it localized?

The Witness: Relatively. And it isn't the severe type of pain you get after infections. But he certainly had his share of pain at the time.

Q. (By Mr. Olson): Later?

A. At the time, chiefly. He had his share of pain, but you asked——

Q. Was he in a condition of shock?

A. He was not in severe shock.

Q. But he was in shock?

Mr. Callaway: Are you going to lead the doctor?

Q. (By Mr. Olson): Was he in shock? Was he in any shock? [203] You just brought that question to my mind.

(Testimony of Dr. Howard F. Detwiler.)

A. Well, all I can say, in answer to that question, is that most patients with injuries of this type have a degree of shock. I don't recall whether Mr. Byrne was in shock or not. I don't have a note.

The Court: The shock would not last long?

The Witness: Only a few minutes.

The Court: There was no evidence of shock when you saw him?

The Witness: No severe shock that would even warrant our putting it on his record.

The Court: I see.

Q. (By Mr. Olson): What is the effect of shock?

A. Shock is manifested by collapse of the patient, marked pallor of the patient, often fainting and passing out, cold clammy perspiration and a marked fallen blood pressure.

Q. Were his senses as acute in shock as a person not in shock?

A. No, but I don't mean to infer that Mr. Byrne was in a severe state of shock.

Q. In your opinion, Doctor, excluding an operation that we have discussed, will Mr. Byrne's hand remain as it is now for the rest of his life?

A. No. I believe not. I believe it will get worse.

Q. And why?

A. Obviously, Mr. Byrne has no flexion motion, compensatory union of the exterior tendons. Over a period of years it may even cause deformity of his finger. I mean, even a pulling backward, in

(Testimony of Dr. Howard F. Detwiler.)

time, and there again the nerves apparently—we can't say for certain that the nerves are not united, because we attempted to unite them. We can say this: There is a lot of numbness still, indicating that if the nerves were united that the sensation has not as yet traveled down the nerve root which often takes a period of several years.

If this does not take effect there again he will have a tendency of continued atrophy of his finger. In other words, a continued tendency to shriveling, so far as his finger is concerned. It should be increasingly in his way if it isn't repaired.

Mr. Olson: Your witness.

Cross-Examination

By Mr. Callaway:

Q. Doctor, let's take a look at those X-rays again, now, you are talking about.

Do you see a clearly defined fracture line there at all?

A. You see a very clearly defined fracture line extremely clear. There is absolutely no question of the fracture. It extends from here right down into the joint surface [205] (indicating).

Q. This little piece right there (indicating)?

A. That is right.

Q. It is this little piece (indicating)? Am I doing it right?

A. You have one finger on the right end, at an rate.

(Testimony of Dr. Howard F. Detwiler.)

Q. Mark it on there with a fountain pen.

A. That is it, approximately (indicating). Here it is again here (indicating).

Q. There is no displacement there?

A. Very mild displacement.

Q. Now, wouldn't you expect, if he had had a blow at that area, with a blunt instrument, to get a more extensive fracture of the bone?

A. No, I wouldn't.

Q. You wouldn't? A. No, I wouldn't.

Q. That is what causes bones to shatter and break and displace, isn't it, force? A. Force.

Q. Now, of course, if you had this contraption here, one whirling in one direction and one the other at 7200 revolutions per minute——

Mr. Olson: Correction. They don't go in opposite directions. [206]

Mr. Callaway: All right. In the same direction, then.

Q. (By Mr. Callaway): ——and you got cut, of course the force of this blade might very easily at that speed fracture your finger, might it not?

A. Yes.

Q. It also would, traveling at that speed, chew up your hand pretty badly before you could get it out of there, wouldn't it?

A. Absolutely.

Q. Well, now, if an operation on this gentleman's hand is indicated, why hasn't it been done?

Mr. Olson: I object to that question as calling for a conclusion of the witness.

(Testimony of Dr. Howard F. Detwiler.)

The Court: Read the question.

(The question was read.)

The Court: So far as you know, Doctor. I don't know how he would know that.

Mr. Olson: It calls for a conclusion, your Honor.

The Court: He was not giving a wholesale job to do all the operating that is necessary. The patient has something to say about it.

Mr. Callaway: All right.

The Court: I will sustain the objection.

Mr. Callaway: Very well. I don't think I have anything more. Just a minute, please. [207]

Q. (By Mr. Callaway): Doctor, do you have any further use for those X-rays?

A. We always keep our X-rays.

The Court: That does not make any difference. If you want them, I will take them. We can return them when the case is finished.

Mr. Callaway: I don't want to take them. I would like to have them, and if the doctor wants them back we can return them.

The Court: They will be withdrawn. We will apply the same rule to them we apply to others. We will take them and return them to the doctor when the case is concluded.

Mr. Olson: All right.

The Court: It may be received in evidence.

The Clerk: As Defendant's exhibits, your Honor?

(Testimony of Dr. Howard F. Detwiler.)

The Court: Yes.

The Clerk: Defendant's Exhibit B, in evidence.

(The X-rays referred to were marked Defendant's Exhibit B, and were received in evidence.)

The Court: The jurors may want to look at them. If you do, we will send the shadow box out to you.

Q. (By Mr. Callaway): I don't see any date on this.

A. There is the date there (indicating).

Mr. Callaway: That is all.

The Court: Any redirect examination? [208]

Mr. Olson: No redirect, your Honor.

The Court: You may be excused, Dr. Detwiler.

(Witness excused.)

The Court: It will be stipulated this testimony may be considered and will appear in the record as given before the plaintiff rested.

Mr. Callaway: So stipulated.

Mr. Olson: Yes.

The Court: And that the motion that was made may also appear as though made after this testimony.

Mr. Olson: The plaintiff rests, with one exception. I would like just for the record—I have understood your ruling, and I am not arguing with it—is it my understanding that I am not going to be allowed to have Dr. Boyes testify in this case

because of the fact he is unobtainable in New York until Monday morning?

The Court: You state it as a fact. I have not ruled on anything. He is not here.

Mr. Olson: I would like to ask permission——

The Court: The doctor is not here, and that is all there is to it. He is not here, and I am not continuing any case to wait for any doctor. That is all there is to it. You are supposed to have your doctor here.

Mr. Olson: That is what I want.

The Court: Do not say you are not being permitted to put [209] him on. You do not have him here, and that is all there is to it, and you have rested.

If Doctor Boyes comes here before the case is concluded, if you ask me, I will allow you to put him on out of order.

Mr. Olson: He can't be here until Monday.

Mr. Callaway: Mr. Townsend.

JEROME B. TOWNSEND

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Jerome B. Townsend.

Direct Examination

By Mr. Callaway:

Q. Where do you reside?

(Testimony of Jerome B. Townsend.)

A. Sherman Oaks.

Q. What is your business or occupation?

A. I am a machine salesman.

Q. For whom? A. Woodworkers Supply.

Q. Is that Woodworkers Supply Company of Los Angeles? A. That is right.

Q. By the way, Mr. Townsend, did you have anything to do with the sale to the Selby Company of a panel raiser head? [210]

A. To the extent that they saw one in operation and called us up and ordered it.

Q. Did you take the order? A. Yes.

Q. What did you do, in turn?

A. We sent the order to the Woodworkers Tool Works in Chicago.

Mr. Olson: At this time I would like to object to this whole line of testimony on the ground it is incompetent, irrelevant and immaterial, and has nothing to do with the issues in this case.

The Court: Overruled. Go ahead.

Q. (By Mr. Callaway): Now, was the head returned to you or shipped directly to the——

A. Shipped direct to the customer.

Q. Did you so specify? A. Yes.

Q. Now, I will ask you what connection the Woodworkers Supply Company of Los Angeles has with the Woodworkers Tool Works in Chicago.

Mr. Olson: Don't answer that. I wish to object to that question on the ground it is incompetent, irrelevant and immaterial. On the further

(Testimony of Jerome B. Townsend.)

ground this witness—there is no background laid to show this witness is competent to make—— [211]

The Court: We will find that out. Overruled. I think in all these cases the relationship of the manufacturer to the person who actually uses the product is an important element in the chain causation.

Mr. Olson: If I may just add this: This is an obvious attempt to bring in the question of the Court's jurisdiction, which has been ruled on.

The Court: There is no question of jurisdiction here.

Mr. Olson: Certainly,——

The Court: You need not be afraid. I will wait for jurisdiction.

Mr. Olson: Thank you.

The Court: That is not your job. That is mine.

Mr. Olson: That is all I am worried about.

The Court: They have submitted to jurisdiction. They have not attacked the jurisdiction.

Mr. Olson: On a motion.

The Court: That is denied.

Mr. Olson: Maybe I am wrong, I hope I am, and I wish to be corrected if I am not. It is my impression that they have made their record, insofar as the jurisdiction is concerned, and been ruled upon. I don't want this further proof of lack of jurisdiction to be in this record.

The Court: There is nothing before the Court

(Testimony of Jerome B. Townsend.)

on the question of jurisdiction, nothing to be submitted to the jury. [212] Let us go on.

Q. (By Mr. Callaway): You may answer.

A. To the extent that they handle merchandise of this nature when we have an order for them, they buy direct from them.

Q. Do you handle any other products, other than those made by the Woodworkers Tool Works?

A. Hundreds of them.

Q. Do you stock this particular item?

A. No.

Q. Does the Woodworkers Tool Works of Chicago own any interest in the Woodworkers Supply Company? A. None at all.

Mr. Olson: I object to that question.

The Court: Overruled.

Mr. Olson: This man is obviously incompetent to know that. He is a salesman.

The Court: Overruled.

Q. (By Mr. Callaway: Do they have anything to do with the fixing of the policy of how you run your business? A. None.

Q. As I understand it, the Woodworkers Supply sells woodworking machinery and supplies retail.

A. That is correct.

Q. And that you buy products from various companies [213] at the wholesale price, and sell them.

The Court: I will sustain the objection. You are merely repeating what the witness has already testi-

(Testimony of Jerome B. Townsend.)

fied. It is not necessary. The jury heard him, in the first place.

Mr. Callaway: Very well, your Honor.

Q. (By Mr. Callaway): Now, was the Selby Company billed for this particular panel head?

A. They were.

Q. I will show you a photostatic copy of a bill.

Mr. Olson: Excuse me, Mr. Callaway. What is that torn off there?

Mr. Callaway: I don't know.

Mr. Olson: I do. Can I give you one of my copies that is complete? I object to that with the part torn off, it is not complete. I know what is on there.

Mr. Callaway: I do, too, and it is self-serving.

Q. (By Mr. Callaway): Do you recognize that as being a photostatic copy of an invoice of the Woodworkers Supply Company to the Selby Company?

A. Yes.

Mr. Callaway: I offer it in evidence.

Mr. Olson: I object to the introduction of that I have a complete copy.

Mr. Callaway: Let's present it to the Court and let him [214] rule on it.

The Court: Just a minute. Everything is in the open here, unless I want to have something here at the bench. I do not like attorneys to rush to the bench every minute. The jurors get the impression we are hiding something from them.

State your objection, Mr. Olson.

(Testimony of Jerome B. Townsend.)

Mr. Olson: I object to the introduction of that document on the ground it is not complete.

Q. Have you the complete one?

Mr. Olson: Yes.

The Court: The bill presented to you?

Mr. Olson: I have a copy of that.

The Court: Bring it to me and let me look at it and I will determine whether that should go in or not. If it has any notation put on by the buyer, then it is an addition to it.

Mr. Callaway: That is what it has.

The Court: I will look at it.

Mr. Olson: I can't find it your Honor. I had five of them.

The Court: Then I will overrule the objection and I will let you show me later, if you find it, if it contains something that you think should go in, if it contains anything that was there when the bill was received. Anything [215] they put on there cannot go in.

Mr. Olson: Anything the Selby Company put on?

The Court: Yes. A bill is a bill the way you receive it.

Mr. Olson: The Selby Company is not a party to this action.

The Court: You cannot bind anybody by something that was not on the bill, that they supplied. It is self-serving.

Mr. Olson: I will withdraw the objection.

(Testimony of Jerome B. Townsend.)

The Court: All right. It may be received.

Mr. Clerk: Defendant's Exhibit C in evidence.

(The document referred to was marked Defendant's Exhibit C, and was received in evidence.)

Q. (By Mr. Callaway): Mr. Townsend, what schools or colleges have you attended?

A. Culver Military Academy at Culver, Indiana, and Southern Methodist University at Dallas, Texas.

Q. After you left school, what did you do?

A. I went to work in the woodshops to learn machinery.

Q. And how long did you work?

A. Approximately eight years.

Q. Are you familiar with machinery that is used in connection with cutting of wood?

A. Very much. That is my business.

Q. Did you have anything to do with the superintendency [216] of a millwork shop during that eight years?

A. Not during the eight years.

Q. Afterwards?

A. Yes, sir.

Q. When was that?

A. That was 1942 to '44, superintendent of Anderson Desk Company in Los Angeles.

Q. Do you know what a joiner is?

A. Yes, sir.

Q. What is a joiner?

A. A joiner is a machine for the purpose of removing twist or warp from the surface of wood,

(Testimony of Jerome B. Townsend.)

for the purpose of putting on a flat joint for joining.

Q. What is a shaper?

A. A shaper is what it specifies, for the purpose of producing on a piece of wood a shape or a contour or a detail.

Q. Do you have an opinion as to the length of time it takes, as an apprentice, before you become an experienced shaper?

Mr. Olson: May I object to that question as calling for an opinion of the witness, who, I do not feel, has been qualified as an expert in that field to which he is testifying.

The Court: Overruled. I think it is all preliminary to qualifying him to testify to certain things. [217]

The Witness: In my opinion it would take two and a half years or possibly more to produce a shaper man to be responsible for any operation to be presented to him.

Q. (By Mr. Callaway): Mr. Townsend, did you specify at the time that Selby Company ordered this head the brand of head, or did they specify?

A. They did.

Q. I take it there are other manufacturers making similar products? A. Yes, sir.

Q. Do you know of any product on the market, Mr. Townsend, of a type of this where the arms are not made out of cast steel? A. Not any more.

Mr. Olson: I object to the question on the

(Testimony of Jerome B. Townsend.)

ground this man has not been qualified either as a chemist or engineer.

The Court: That is all right. He has testified he is familiar with the market. He asked if there were any on the market.

Mr. Olson: I don't think that was the question.

The Court: Yes. Do you know of any other product on the market like this, which is not made of cast steel? That was the question.

The Witness: Not any more.

Q. (By Mr. Callaway): What did they use to make them out [218] of?

A. Brass and bronze.

Q. Were the brass and bronze ones as strong, have the tensile strength, as cast steel?

A. No, they did not.

Mr. Olson: I object to that question, and the answer.

The Court: I will sustain the objection as to that. I do not think you have qualified him to give an opinion as to the tensile strength of tools.

Do you know why the manufacture of this type of device in bronze or brass was discontinued?

The Witness: For several reasons. As we have developed various alloys for the purpose of cutter heads we found alloys which were easier to use and had more strength. That is the prime reason.

Q. (By Mr. Callaway): Now, Mr. Townsend, have you sold any of these same devices made by the Woodworkers Tool Works of Chicago here in Los Angeles?

(Testimony of Jerome B. Townsend.)

A. You have reference to this particular type of head?

Q. Yes. The double one.

A. Yes; two of them.

Q. How long have they been in use?

A. That is a very hard question to answer. Approximately a year and a half.

Mr. Olson: I object to the question and I object to the [219] answer and make a motion to strike, as to what other heads have done.

The Court: I will sustain the objection. We are not concerned with whether he sold a hundred or a thousand. We are interested in what this did, if anything.

Q. (By Mr. Townsend): How much time is required for one to become a joiner in millwork?

Mr. Olson: I object to that question.

The Court: I will sustain the objection. When you asked that question before I did not know what your object was. I can see your object now. You cannot prove incompetency or negligence on the part of the plaintiff in this manner. This man is not your man. He cannot give an opinion as to this man's competency by saying how long it requires to have a man become a joiner.

Mr. Callaway: Well, I thought, your Honor, if a man is——

The Court: No, he is not. I doubt if the evidence is admissible for any reason. I confined myself by saying this man is not qualified to give any

(Testimony of Jerome B. Townsend.)

opinion as to the competency of a man to become a joiner. There is no evidence this man was employed in any special capacity. He was put to work at this. You have pleaded contributory negligence. You have to show that he did something about this job that he should not have done, from which the injury is traced.

You cannot prove it by something that some people required [220] two years before they were put on this machine. Not by this witness, anyway. I will rule this man is not qualified to give an opinion as to how long it takes to become a joiner, to do this kind of work.

Mr. Callaway: That is all.

Cross-Examination

By Mr. Olson:

Q. Mr. Townsend, your job is a salesman?

A. That is right.

Q. How long have you been a salesman?

A. Fourteen years.

Q. You are now a salesman?

A. That is right.

Q. You say you went to the University of——

A. Southern Methodist, in Dallas, Texas.

Q. What did you study there?

A. Business administration.

Q. You didn't study engineering, chemistry or physics? A. No.

The Court: Mechanical engineering?

(Testimony of Jerome B. Townsend.)

The Witness: No.

The Court: You actually never worked with a lathe, or things of that kind?

The Witness: Only as applied to wood.

The Court: Before? [221]

The Witness: After I was out of school.

Q. (By Mr. Olson): Do you have any capacity with the Woodworkers Supply Company except as a salesman? A. No, sir.

Q. Just as a salesman? A. Yes.

Mr. Olson: On that ground alone I would like to move to strike all this man's testimony regarding the policy of the Woodworkers Supply Company.

The Court: Overruled.

Q. (By Mr. Olson): Mr. Townsend, what is an alloy?

A. An alloy is a composite of several metals.

Q. You stated in your direct examination that as we developed steel we found it was better with alloys.

A. I probably should have said that the manufacturers of the supplies we handle had found these alloys——

Q. Your testimony is it is stronger with the presence of alloys? A. It is.

Q. As distinguished from steel without alloys?

A. It is.

Q. Should machinery, in your opinion, machinery used for cutting wood have alloy steel?

(Testimony of Jerome B. Townsend.)

A. It depends on the purpose for which it is being used. [222]

Q. Should that machinery?

A. I beg your pardon?

Q. Should metal used for the purpose for which the metal in this part was to be used have alloy steel in it? A. It could or it could not.

Q. Should it?

A. I couldn't answer that. I say it could or could not.

Q. Would it make it stronger?

A. Not necessarily.

Q. Didn't you just testify that alloy steel is better and made steel stronger? A. It does.

Q. Alloy steel in this part would not make it stronger? A. It would, yes.

Q. When you went out to the Selby Company regarding negotiations for the sale of this raiser head, did you take with you a catalogue?

A. I did.

Q. Did you show it to somebody at the plant there?

A. I believe I showed it to William Walker.

Q. Do you have that catalogue with you?

A. I do.

Q. May I see it?

A. I don't have it here. It is at that bench there [223] (indicating).

Q. Is this catalogue the one you showed Mr. Walker?

(Testimony of Jerome B. Townsend.)

A. It is one like it. It might not have been that particular one.

Q. Did the catalogue you showed Mr. Walker, whether this or another one of its kind, have on it as this, Woodworkers Tool Works? A. Yes.

Q. Catalogue Series K-1945? A. It did.

Q. To your personal knowledge the panel raiser head in question here was shipped from the Woodworkers Tool Works directly to the Selby Company air express? A. Yes.

Q. Do you know whether that part was ever paid for? A. It is not paid for.

Q. Do you know the reason why it wasn't paid for?

A. Well, it failed in that this controversy came up. Whether it was the failure of the head or something else, I don't know. The bill has not been paid.

Mr. Olson: That is all.

Redirect Examination

By Mr. Callaway:

Q. I show you a paper and ask you what it is.

A. This is the original invoice from Woodworkers Tool [224] Works for Woodworkers Supply Company for a Champion panel head.

Q. That is the one sold to the Selby Company?

A. Yes.

Mr. Callaway: I offer this in evidence.

The Court: It may be received.

(Testimony of Jerome B. Townsend.)

The Clerk: Defendant's Exhibit D in evidence.

(The document referred to was marked Defendant's Exhibit D, and was received in evidence.)

Mr. Callaway: That is all.

Mr. Olson: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Have you any other witnesses?

Mr. Callaway: We have other witnesses. I can go forward with the depositions. They are fairly lengthy.

The Court: Will you have other witnesses in addition to the depositions?

Mr. Callaway: Yes. But they are not very long. I think another half hour will take care of it, so far as witnesses are concerned.

The Court: All right. Ladies and gentlemen of the jury, we are about to take a recess to 1:30. The Court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial, or to form or express [225] an opinion thereon until the cause is submitted to you.

(Thereupon, at 12:10 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day.) [226]

Friday, February 17, 1950

The Court: Let the record show the jury is in the box.

Mr. Olson: May I recall Mr. Townsend to the stand for two questions?

JEROME B. TOWNSEND

recalled as a witness on behalf of the plaintiff, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Townsend, when did you first become aware that the panel raiser head in question here had broken and an injury had occurred?

A. When I was called by the Selby Company.

Q. And did you go over there after that call?

A. Yes, sir.

Q. And did you look at the part?

A. Yes.

Q. Did you or did you not tell either one of the Selbys or Mr. Walker that the part in your opinion was faulty?

A. I don't recall that I did.

Q. Could you have? A. Could I have?

Q. Yes.

A. I certainly could. And I also have said I didn't think so.

Q. You don't remember? A. No.

Q. Do you remember having a conversation about it? A. Yes.

(Testimony of Jerome B. Townsend.)

Q. You remember looking at it? A. Yes.

Q. You don't remember if you made any comment about it being faulty or not?

A. No, I do not. I don't remember whether I did or not.

Q. When you looked at this panel head did you see this blow-hole in the broken part?

A. I did.

Q. Is that the same blow-hole as you see now?

A. As near as I recall, yes.

Mr. Olson: That is all.

Mr. Callaway: Is there anything unusual about steel castings having blow-holes in them?

The Witness: Not that I know of, no, sir.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.) [228]

Mr. Olson: Plaintiff rests.

The Court: You rested quite a while ago. This is the defendant's case.

Mr. Olson: Yes. I am sorry.

The Court: Call your next witness.

Mr. Callaway: Mr. Preuer.

ELMER H. PREUER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Elmer H. Preuer.

(Testimony of Elmer H. Preuer.)

Direct Examination

By Mr. Callaway:

Q. Mr. Preuer, your business or occupation?

A. Machinery supply business.

Q. What firm or style do you do business under?

A. Operating under the name of Woodworkers Supply Company, individual ownership.

Q. Partnership or sole proprietor?

A. Individual ownership.

Q. Who owns it? A. I do.

Q. How long have you been in business? [229]

A. Since 1928.

Q. 1928? A. Yes.

The Court: He is from the concern, or the local concern?

Mr. Callaway: Local concern.

The Court: All right. Go ahead.

Q. (By Mr. Callaway): What relationship do you have with the Woodworkers Tool Works of Chicago?

Mr. Olson: To which I object. It is incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: We buy and sell machinery and supplies, and in our course of business there are certain items that are manufactured by the Woodworkers Tool Works which we sell on a commission basis.

(Testimony of Elmer H. Preuer.)

Q. (By Mr. Callaway): By that do you mean you pay them a certain price?

A. They bill us and we, in turn, bill the customer.

Q. They bill you the wholesale price and you bill the customer the retail price?

A. They would bill us, if an item were \$75.00 they would bill us \$75.00 less 10 per cent.

Q. Do they have any financial interest in the concern? A. Our company?

Q. Yes. [230] A. None whatsoever.

Q. Have they ever had? A. No, sir.

Q. Do you represent any other people who made wood-cutting or working machinery?

A. A hundred accounts.

Q. Beg pardon?

A. About a hundred accounts.

Q. A hundred manufacturers?

A. That is right.

Q. Did your concern sell a panel raiser head to the Selby Company? A. Yes, sir.

Q. Did you bill the Selby Company for that?

A. Yes, sir.

Q. Did, in turn, the Woodworkers Tool Works bill you for it? A. Yes, sir.

Q. Did they give you any instructions as to how you should operate your business or sell that product? A. No, sir.

Q. In other words, the relationship is solely buying from them at wholesale and selling at retail?

(Testimony of Elmer H. Preuer.)

A. That is correct.

Q. It is not unusual, is it, Mr. Preuer, where you place [231] an order for some manufacturer, where you don't carry the item in stock, to have them ship direct to the buyer?

A. That is often done.

Q. It was done in this case?

A. Especially where the customer is in a hurry and requests it to come air express.

Mr. Callaway: That is all.

Cross-Examination

By Mr. Olson:

Q. Mr. Preuer, how often during a given year of business would you say you sell Woodworkers Tool Works products?

A. Well, that is rather irregular. In other words, we may have a half dozen invoices, and none the next.

Q. But you do have a running course of business with them every year?

A. That is right.

Q. You are involved in transactions in which the Woodworkers Tool Works sell products at all times, that is, you handle it?

A. Not all of their products.

Q. I say some.

A. Some items, yes.

Q. Do you keep a catalogue of the Woodworkers Tool Works in your place of business?

A. Yes. [232]

Q. Your salesmen are equipped with them?

(Testimony of Elmer H. Preuer.)

A. No. We have our office file catalogue which they take out if they feel they need it.

Mr. Olson: That is all.

The Court: If a customer asks for one of their tools, you or the salesman will refer to the catalogue?

The Witness: That is correct.

The Court: So you identify the tool you want?

The Witness: Yes.

The Court: You heard your salesman Mr. Townsend testify this morning?

The Witness: Yes.

The Court: He took the catalogue along with him?

The Witness: Yes.

The Court: He had the catalogue when they gave the order?

The Witness: Yes.

The Court: That catalogue is made by them?

The Witness: Yes.

The Court: By the concern?

The Witness: Yes.

The Court: They turn it over to you for taking orders?

The Witness: Yes.

The Court: You do not put out your own catalogue?

The Witness: No. [233]

The Court: All right.

Mr. Callaway: That is all.

Mr. Olson: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Callaway: We have the depositions at this time.

The Court: All right.

Mr. Callaway: Do you have any suggestion, your Honor, as to how you want this handled?

The Court: Put your associate on the stand and you ask the questions and he answers. Do not read the argument of counsel. When you come to an objection counsel will make it. Repeat the objection if reservation has been made.

Mr. Callaway: We have only one copy of this.

The Court: I have a copy.

Mr. Callaway: Mr. Olson could read the questions and I will read the answers, and Mr. Lopardo will make the objections.

The Court: Which deposition are you calling for? We have to open them up. You gentlemen are used to having depositions in the State Court where you can look at them. We do not do that with ours. Our depositions are sealed and not opened until the day of the trial.

Mr. Callaway: I am seeking to introduce the depositions [234] of William Victor Knourek and Charles E. Meissner.

The Court: The air mail package is still unopened. I will order the clerk to open it. Those

are the originals that were sent to the clerk of the Court.

Mr. Olson: May I ask if the originals are signed?

The Court: I will have to see.

Mr. Callaway: I am informed they have been. They will speak for themselves.

Mr. Olson: There are two, your Honor.

The Court: Yes. Both of them are signed. The signature of Mr. William Victor Knourek appears on page 79 and the signature of Charles E. Meissner appears on page 189.

If you reserved your objections, you may make any new ones. If you did not, then you cannot make them here.

Mr. Callaway: They were reserved in the stipulation.

The Court: Let us take a look and see. Eliminate the preamble. Let us see what you reserve.

Mr. Callaway: The stipulation is attached to the original. Here is the stipulation regarding that, your Honor, on the original depositions.

The Court: Let us see what it says. There is no reservation of any exceptions.

Mr. Callaway: I thought there was.

The Court: There is no reservation of any exception. Unless they were made there, you cannot make any. [235]

Mr. Callaway: We will note them——

The Court: That applies to both sides.

Mr. Lopardo: It was taken under Rule 26. I thought perhaps if it wasn't admissible in evidence, they could be——

The Court: No. Rule 26 does not say you can take a deposition and not reserve, when you are represented by attorneys, both sides, and accumulate a record, and then leave a job to do all over again by the Court. If that were true, I would not have allowed the depositions to be taken. Did I not issue the order of the taking of—

Mr. Lopardo: It is by stipulation.

The Court: An order is necessary. Is not that stipulation signed by me?

Mr. Olson: No.

The Court: You got by with something, then. That is not the rule of the Federal Court. No stipulation is ever filed or has any official standing unless it is approved by the Court. I know most of you do not do it. That is why we keep a stamp saying, "So ordered."

All right. We are wasting a lot of time. Go on and see what objections there are.

Mr. Olson: I am to read the objections on direct and he on cross-examination?

The Court: Yes. You make the objections, if you want to. I do not want them read, because I do not want the [236] wrangling of counsel. I know what counsel do when they are away from the restraint of a Court, before a notary. They make speeches and everything else. I do not want those read.

Mr. Callaway: We are not going to read them.

The Court: I give you warning. I know what attorneys do when they are away from our fatherly care and supervision.

Mr. Callaway: We can start on page 3.

DEPOSITION OF
WILLIAM VICTOR KNOUREK

Mr. Lopardo: "William Victor Knourek, a witness of lawful age, produced on behalf of the defendant and being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and under oath deposed and testified as follows:

"Direct Examination

"Will you state your name, please?"

Mr. Callaway: "William Victor Knourek."

Mr. Lopardo: "And where do you live?"

Mr. Callaway: "At 820 William Street, River Forest, Illinois."

Mr. Lopardo: "And what is your business or occupation?"

Mr. Callaway: "Vice-president in charge of production, of Woodworkers Tool Works, Inc."

Mr. Lopardo: "That is a corporation, is it?"

Mr. Callaway: "It is."

Mr. Lopardo: "And you have been connected with that [237] concern how long?"

Mr. Callaway: "Since 1928."

Mr. Lopardo: "That is an Illinois corporation, is it?"

Mr. Callaway: "It is."

Mr. Lopardo: "And the plant of Woodworkers Tool Works, Inc., is located where?"

Mr. Callaway: "At 222 South Jefferson Street, Chicago 6, Illinois."

(Deposition of William Victor Knourek.)

Mr. Lopardo: "And do you maintain a plant or office anywhere else?"

Mr. Callaway: "We do not.—Pardon me: We have a branch on Adams Street in Chicago, where we manufacture and rebuild woodworking machinery. It is part of Woodworkers Tool Works, Inc.; we just did a little expanding; we have a two-story and four-story warehouse, which we use for rebuilding and manufacturing."

Mr. Lopardo: "Do you know the address on Adams Street?"

Mr. Callaway: "Yes; 610 and 614 West Adams Street. But none of this work was ever done over there."

Mr. Lopardo: "Do you have any place of business outside of Chicago?"

Mr. Callaway: "We do not."

Mr. Lopardo: "And do you have any show rooms, or any employees outside the state of Illinois?"

Mr. Callaway: "We do not; except to the extent we have [238] one salesman that travels."

Mr. Lopardo: "Do you have any salesmen in the state of California?"

Mr. Callaway: "No, sir, we do not."

Mr. Lopardo: "And do you have any place of business in the state of California?"

Mr. Callaway: "We do not."

Mr. Lopardo: "Do you have any agents in the state of California?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "We do not."

Mr. Lopardo: "Is there anyone in California who is authorized to represent your company in a business way?"

Mr. Callaway: "There is not."

Mr. Lopardo: "The Woodworkers Supply Company, do they have any connection with your company?"

Mr. Callaway: "They do not."

Mr. Lopardo: "And have they at any time been authorized to act as your agent?"

Mr. Callaway: "No, sir."

Mr. Lopardo: "Now, Mr. E. H. Preuer of that company, is he employed by your company?"

Mr. Callaway: "No, sir."

Mr. Lopardo: "Then, the only dealings that you have had with the Woodworkers Supply Company is that you have sold them some raiser heads; is that correct?" [239]

Mr. Callaway: "Panel raiser heads, and other tools we manufacture."

Mr. Lopardo: "Those sales, were they made here in Chicago, or elsewhere?"

Mr. Callaway: "The orders were mailed in to us from out of state."

Mr. Lopardo: "And then you delivered the merchandise to whatever carrier they designated, is that correct?"

Mr. Callaway: "That is right."

Mr. Lopardo: "The panel raiser head in ques-

(Deposition of William Victor Knourek.)

tion, that was delivered to air freight, is that correct?"

Mr. Callaway: "That is right."

Mr. Lopardo: "And you received an order from Woodworkers Supply Company requesting you to sell them two panel raiser heads, is that correct?"

Mr. Callaway: "That's right."

Mr. Lopardo: "And you delivered them pursuant to their directions to air freight for delivery?"

Mr. Callaway: "I believe we only shipped one air freight; the other one was regular express, if there were two."

Mr. Lopardo: "And then you billed them for these two items, did you not?"

Mr. Callaway: "We did."

Mr. Lopardo: "They were not acting as your agents or servants in making a sale?" [240]

Mr. Callaway: "They were not."

Mr. Lopardo: "And the transaction between you and the Woodworkers Supply Company was merely that of vendor and vendee, of seller and purchaser?"

Mr. Callaway: "That is right."

Mr. Olson: Your Honor, do you want me to read Mr. Johnston's objection that he made, the attorney representing me, or shall I make my own?

The Court: You make the objection.

Mr. Olson: I would like to object to this whole line of testimony for two reasons. All the questions tending to show non-agency are leading and suggestive, and not the proper way to prove the relation-

(Deposition of William Victor Knourek.)

ship. I make a motion to strike all that testimony as having nothing to do with the issues in this case; irrelevant and immaterial. There is no purpose, other than to again raise the question of the jurisdiction of this Court.

The Court: The objection is overruled. I do not want to state the law in advance. I want you jurors to hear the arguments in this case and the instructions about the doctrine which is known as *res ipsa loquitur*, which means a thing speaks for itself.

Certain inferences are drawn as to certain things that happen by means of an instrumentality, which is under the control of a certain party. In order that you understand [241] the application of this doctrine, it is absolutely necessary to understand the relationship of the parties to this transaction. For that reason the relationship of the Chicago concern which is being used here is absolutely important, for a proper understanding of the arguments and the instructions to be given you by the Court. That is why the Court is allowing in this testimony as to the relationship, so that the foundation be laid for the instructions the Court is going to give you.

Mr. Lopardo: "What is the relationship between your company and the Woodworkers Supply Company?"

Mr. Callaway: "There is no relationship whatsoever."

Mr. Lopardo: "You did have dealings with them?"

(Deposition of William Victor Knourek.)

Mr. Olson: That is my question.

Mr. Lopardo: Excuse me.

Mr. Olson: May I make this clear to the jury? When I interpose it is Mr. Johnston talking, who was representing Mr. Byrne and myself in this deposition. Mr. Hubbard represented these gentlemen. So when I interpose it is Mr. Johnston, my attorney, talking.

Mr. Lopardo: I want to say, your Honor, there are times here when the attorney representing the plaintiff just cut in and started to ask questions. There is no way of knowing, really. For instance, he starts now, and there are a series of questions that Mr. Johnston asks. [242]

The Court: I am not going to allow that to be done, any cutting in by the other attorney, unless it was by consent. It will not be allowed unless it was by consent.

Mr. Olson: There is no objection to this cutting in.

The Court: That does not make any difference. I will not allow the continuity to be broken.

Mr. Olson: May I go back, then, and ask these questions when I have cross-examination, as though they were on cross-examination?

The Court: Yes. You may go back if they are not asked in cross-examination.

Mr. Olson: Yes.

The Court: Then you may ask them as a part of your showing.

(Deposition of William Victor Knourek.)

Mr. Olson: Yes.

The Court: I do not want to deprive you of the benefit of the questions. I do not want any cutting in by the other attorney.

Mr. Lopardo: The next is over on page 9.

Mr. Callaway: Go ahead.

Mr. Lopardo: About the fifth or sixth line down

Mr. Callaway: All right.

Mr. Lopardo: "The head, where do you obtain that?"

Mr. Callaway: "The casting?"

Mr. Lopardo: "Yes." "What is the head?"

Mr. Callaway: "The head is composed of two parts."

Mr. Lopardo: Mr. Johnston interposes a question at that point.

Mr. Olson: Go ahead. I will get them later.

The Court: Skip that.

Mr. Callaway: Then he goes over to about page 12.

Mr. Lopardo: Page 12. "Is there any other locking device there?"

Mr. Callaway: "The pin locates the top head and on this sleeve we have milled two flats whereb—Whereas we have tapped holes in the second part for tempered hollow head set screws; and these, in turn, are tightened against the flats of the sleeve which is part of part No. 1."

Then I think you go over to about page 14.

Mr. Lopardo: "I will ask to have marked a

(Deposition of William Victor Knourek.)

Defendant's Exhibit No. 1 the panel raiser head, part No. 1 and part No. 2."

Did an exhibit come in from Chicago wrapped under separate cover?

The Court: We received nothing.

Mr. Lopardo: It was sent out with the deposition and on the last page attested there is a stipulation with counsel it may be sent out under separate cover. This is the statement of the notary:

"I further certify that Defendant's Exhibit 1 was produced [244] at, and constitutes a part of, these depositions; and that pursuant to stipulation of the parties, by their respective counsel, the said Defendant's Exhibit 1 is returned under separate cover."

The Court: Well, I will send Mr. Childress to the clerk's office and see if he can find it. Go ahead.

Mr. Callaway: "The part with the long sleeve is part No. 1, the part with the short sleeve is part No. 2."

Mr. Lopardo: "I will ask you, Mr. Kuhn, to mark the lower portion, with the longer sleeve, part No. 1; and the upper portion part No. 2."

"We will let the record show that those portions of the record which have been referred to as Part 1, Part 1 is identified as Part 1 of Exhibit 1; and that part of the record which has referred to as Part 2, that has been marked as Part 2 of Exhibit 1. Is that correct?"

(Deposition of William Victor Knourek.)

Mr. Olson: "Yes."

Mr. Lopardo: "Will you look at this, and tell us what Defendant's Exhibit 1 for identification is?"

Mr. Callaway: "Defendant's Exhibit 1 is a Champion panel raiser head."

Mr. Lopardo: "Is that head from the same lot of steel castings from which the raiser head in question was manufactured?"

Mr. Callaway: "That's right." [245]

Mr. Lopardo: "And from whom were the castings purchased?"

Mr. Callaway: "Gunitite Foundries, of Rockford, Illinois."

Mr. Lopardo: "Of what material is part 1 and part 2 made?"

Mr. Callaway: "Cast steel."

Mr. Lopardo: "And that is purchased from Gunitite Foundries, is that correct?"

Mr. Callaway: "That's right."

Mr. Lopardo: "Prior to this time you used another type of material, is that correct?"

Mr. Callaway: "Before making this head out of cast steel,——"

Then there was an interruption, and another question asked.

Mr. Lopardo: "About how long before it was shipped? If you don't know that, maybe Mr. Meissner will know."

Mr. Callaway: "I could say from three to six months before they were shipped."

(Deposition of William Victor Knourek.)

Mr. Lopardo: "Now, the Gunit Foundries from whom you purchased this, are you familiar with their standing in the trade?"

Mr. Callaway: "They are one of the best in the steel castings business."

Mr. Olson: At this time I would like to object to that question and move the answer be stricken on the ground it has nothing to do with the issues in this case, and is irrelevant [246] and immaterial.

Mr. Lopardo: Your Honor, all we are trying to prove is we exercised due care in purchasing——

The Court: That is not a defense in California. I will sustain the objection. I read the record while we were discussing the matter, the statement of the Supreme Court in the Virtue case. That is *Sheward v. Virtue*, 20 Cal. (2d) 410. It says there the mere fact you bought from a first-class concern is not material.

Mr. Lopardo: We are not trying to rely on that alone.

The Court: It is not a defense. It is not material at all.

Mr. Lopardo: "You had purchased steel castings from them prior to the lot from which the panel raiser head was manufactured, which was sold to the Woodworkers Supply Company; is that correct?"

Mr. Olson: I would like to also—you didn't answer it?

Mr. Callaway: Make your objection.

(Deposition of William Victor Knourek.)

Mr. Olson: I will make an objection to the question on the same ground.

The Court: The fact they were purchased, I will allow that fact.

Mr. Callaway: "I don't know."

The Court: From whom or what concern, or the standing of the concern is not material. [247]

Mr. Callaway: "I don't know."

Mr. Lopardo: "How long have you purchased from them?"

Mr. Callaway: "I would have to look at my records."

Mr. Lopardo: "I mean, approximately how many years?"

Mr. Callaway: "This could be the only order we ever gave them."

Mr. Lopardo: "Who is in charge of your plant for the manufacture of these raiser heads?"

Mr. Callaway: "Charles Meissner."

Mr. Lopardo: "What is his position?"

Mr. Callaway: "Factory superintendent."

The Court: Just a moment. We will stop right now. We have found the missing box.

Mr. Clerk, will you open it?

You do not need to stop, Mr. Lopardo.

Mr. Lopardo: "And he has direct charge of the shop, is that correct?"

Mr. Callaway: "He has direct charge of the shop and orders all materials he uses for manufacturing tools."

Mr. Lopardo: "And the employees or workmen

(Deposition of William Victor Knourek.)

are under his direct supervision and direction?"

Mr. Callaway: "That's right."

Mr. Lopardo: "I think that is all I have; you may cross-examine."

Mr. Olson: Does your Honor want me to proceed with Mr. [248] Callaway?

The Court: Just a moment. Before we go to cross-examination I think you ought to offer the exhibit.

Mr. Olson: We will have to go back to page 7.

The Court: Counsel may ask the questions so you will be free to make the objections, Mr. Lopardo.

This box contains parts 1 and 2.

Mr. Callaway: We will reoffer them in evidence.

The Court: They may be received as Defendant's exhibits.

Mr. Lopardo: May they be taken out?

Mr. Callaway: May these gentlemen be excused?

The Court: Yes, the men who have just finished.

The Clerk: Is this admitted as Plaintiff's or Defendant's Exhibit?

The Court: Defendant's Exhibit.

The Clerk: That will be Defendant's Exhibits E and F, being 1 and 2, respectively.

(The articles referred to were marked Defendant's Exhibits E and F, respectively, and were received in evidence.)

Mr. Olson: May I see them?

The Court: Yes.

(Deposition of William Victor Knourek.)

Mr. Olson: This has guards on it.

Mr. Callaway: To keep you from getting cut, it has guards on it. Or, rather, it doesn't have the blades in, or something. [249]

Mr. Lopardo: It has the blades in it.

The Court: We will not stop to comment. Nobody is testifying.

Mr. Olson: Referring you back to page 7, where these interruptions were made in the form of cross-examination I will be Mr. Johnston now.

Cross-Examination

"You did have dealings with them?"

Mr. Callaway: "As far as selling tools, yes. When tools are sold by other dealers in the country we extend them a courtesy discount, whereas they buy this tool from us and resell it."

Mr. Olson: "Was that the arrangement between you and the Woodworkers Supply Company?"

Mr. Callaway: "That is right."

Mr. Olson: "I mean, did they buy from you?"

Mr. Callaway: "They bought from us; we billed them and they, in turn, billed the customer. I believe we allow them a 10 per cent commission."

Mr. Olson: "Wasn't it Woodworkers Supply Company, out there in Los Angeles, that placed this order?"

Mr. Callaway: "That's right."

Mr. Olson: "At 1222 Santa Fe Avenue, Los Angeles?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "I don't know their street address."

Mr. Olson: "I am not trying to mislead you, but my information in my file shows that Woodworkers Supply Company, [250] 1222 Santa Fe Avenue, Los Angeles, took the original order on this."

Mr. Callaway: "They did; and they mailed the order to us."

Mr. Olson: "And just for the sake of the record, that was for a panel raiser head manufactured by you, which was listed in your 1945 K catalog; that is your catalog, put out by your company, Woodworkers Tool Works, Inc., isn't that correct?"

Mr. Callaway: "That's right."

Mr. Olson: "And that had a 1 $\frac{1}{4}$ inch bore, right hand; is that correct?"

Mr. Callaway: "The panel raiser head in question?"

Mr. Olson: "Yes."

Mr. Callaway: "I don't know the bore size on it. 1 $\frac{1}{4}$ inch bore, is correct."

Mr. Olson: "And then 1 $\frac{1}{4}$ inch bore, right hand, Champion panel raiser head correctly describes the raiser head in question here?"

Mr. Callaway: "That is right."

Mr. Olson: "And that was manufactured by your company?"

Mr. Callaway: "Yes, sir."

Mr. Olson: "I mean the raiser head in question here was manufactured by your company?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right." [251]

Mr. Olson: "The whole thing is the head, isn't it?"

Mr. Callaway: "The head is composed of two parts."

Mr. Olson: "Would you please state what the head consists of; just describe it briefly?"

Mr. Callaway: "All right: The head consists of two parts, the bottom part having three fingers in the shape of a star fish; and these, in turn, have high-speed steel knives fastened to them by two three-eighths inch case-hardened cap screws."

Mr. Olson: "By 'bottom part,' you are referring to the one which fits immediately on the spindle?"

Mr. Callaway: "It goes on the spindle, yes."

Mr. Olson: "And the other part fits over that; is that correct?"

Mr. Callaway: "The other part fits over it in such a manner that when the two pieces are put together they are in a staggered position."

Mr. Olson: "Now, just for the sake of the record, the second part, as you call it, also has three arms, upon which three knives are mounted?"

Mr. Callaway: "That's right."

Mr. Olson: "And the three arms and the three knives are substantially similar to those on the first part?"

Mr. Callaway: "That's right."

Mr. Olson: "And the second part fits over the

(Deposition of William Victor Knourek.)

first so [252] that between the two there are six arms and six knives mounted thereon, is that correct?"

Mr. Callaway: "That's right. The second part of this panel raiser head fits over the sleeve which is part of the first part."

Mr. Olson: "And the first part is mounted directly on the spindle of the machine on which the unit is operated, is that correct; that is, on which the head is operated?"

Mr. Callaway: "They both operate on the machine together."

Mr. Olson: "Yes, but the second one is mounted on the first part?"

Mr. Callaway: "Yes, by two hollow head set screws which are tightened against the flats which are milled on the sleeve which is part of the first part of the panel raiser head. The reason for this keyway (indicating) is that if the two parts were indexed the same the knives would strike each other."

Mr. Olson: "What do you mean by 'indexed the same'?"

Mr. Callaway: "If these were just like that, (indicating) one on top of another. This head is not supposed to be run this way at all, (indicating) it cannot be run that way."

Mr. Olson: "That is, if the knives were exactly opposite each other when mounted on the spindle, that is what you mean? They are exactly opposite each other now." [253]

(Deposition of William Victor Knourek.)

“This whole unit is the head, is that correct?”

Mr. Callaway: “That’s right.”

Mr. Olson: “Then we can agree, can we, that the correct mounting of these two parts of the panel raiser head in question is to have the knives staggered so that instead of the two knives being directly opposite each other on the spindle shaft they are so mounted by means of the set screw that you mentioned——”

Mr. Callaway: “Keyway.”

Mr. Olson: “All right, the keyway—that one knife on one part is halfway between the position of the two knives of the other part; is that correct?”

Mr. Callaway: “So far, yes.”

Mr. Olson: “Go ahead, if there is any explanation.”

Mr. Callaway: “With that we have a slotted keyway in the sleeve of part No. 1——”

Mr. Olson: “Which is mounted immediately upon the spindle, is that right?”

Mr. Callaway: “That’s right.”

Mr. Olson: “Now, go ahead.”

Mr. Callaway: “And we have a pin on the second part——”

Mr. Olson: “You mean a set screw?”

Mr. Callaway: “No, there is no set screw at all; it is a pin.”

Mr. Olson: “Oh, yes; that fits in the slot?”

(Deposition of William Victor Knourek.)

Mr. Callaway: "Yes."

Mr. Olson: "Fits in the slot so that the adjustment will always be correct?"

Mr. Callaway: "No, this is done so that the head can be put together only one way; and if the head is not put together with this pin in the slotted key-way the head cannot be used."

"The pin locates the top head, and on this sleeve we have milled two flats whereby——"

Mr. Olson: "The two flats being the two flat spaces milled on the shaft at about one-third of the way around the shaft, each one of them, the other third being represented by the slot; about one-third way around is one milled flat, and about one-third way around again is another milled flat; is that right?"

Mr. Callaway: "Yes. Whereas we have tapped holes in the second part for tempered hollow head set screws; and these, in turn, are tightened against the flats of the sleeve which is part of part No. 1."

Mr. Olson: "The set screw being in part No. 2."

Mr. Callaway: "Yes, sir."

Mr. Olson: "All right."

Mr. Callaway: "These set screws are locked when the desired height of part No. 2 is made."

Mr. Olson: "Pardon me: Desired height or distance [255] away from part No. 1, is that right?"

Mr. Callaway: "That's right."

Mr. Olson: "We have been talking about the lower part and the upper part; and all you mean

(Deposition of William Victor Knourek.)

by that is that the so-called lower part is the one which is over-all larger, and is mounted directly on the spindle?"

Mr. Callaway: "On the shaper spindle."

Mr. Olson: "And the so-called second part, or upper part, is the one which is upper in the assembly; or in other words, which goes over the first part."

Mr. Callaway: "That's right."

Mr. Olson: Now we go to page 15, Mr. Callaway.

"You are now referring to Defendant's Exhibit 1 for identification?"

Mr. Lopardo: "Yes."

Mr. Callaway: "Cast steel."

Mr. Olson: "Will you put in the record the date when the particular panel raiser head in question was made, and when the castings for it were made, if this witness knows?"

Mr. Callaway: "I don't know that."

Mr. Olson: "And they were shipped in the latter part of October, 1948, is that correct?"

Mr. Callaway: "It was shipped air express October 23, 1948, invoice dated October 25, 1948, our invoice B 67519, direct to Selby Company, 1101 West Victory Boulevard, Burbank, [256] California."

Mr. Olson: "May I see it, please?"

Mr. Callaway: "You may."

Mr. Olson: Page 17. "You are now talking about the castings used in this particular Champion panel raiser head which is in question here?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right."

Mr. Olson: Now we go to cross-examination.

"Now, Mr. Knourek, will you please tell me, do I understand correctly that when this unit, the Champion panel raiser head is mounted, for instance, on a double spindle shaper the two arms, I mean the two sets of three arms each are mounted opposite each other but in a staggered fashion, as you have already described; and the wood upon which the cutting operation is being performed runs between them; is that correct?"

Mr. Callaway: "That is right."

Mr. Olson: "What is the usual speed at which such a head is operated, under proper operating conditions?"

Mr. Callaway: "The head can be operated from 3,000 to 7,200 revolutions per minute."

Mr. Olson: "Can it go as high as 10,000?"

Mr. Callaway: "I can see no reason why it could not be run at that speed."

Mr. Olson: "But ordinarily it is 7,200, is that right?" [257]

Mr. Callaway: "Yes, sir. Speed is used for nothing more than a smooth cut, so that sanding operations are not needed after the operation is performed."

Mr. Olson: "That is, the higher the speed, up to the reasonable limits of operation of the tool, the smoother the cut; is that correct?"

Mr. Callaway: "That is right; but the way the head is made, with a shear cut, it will cut at 3,000

(Deposition of William Victor Knourek.)

revolutions per minute and do a very smooth job.”

Mr. Olson: “But it will do a somewhat smoother job at higher speeds; is that correct?”

Mr. Callaway: “That is questionable, sir; I would have to have two machines here and show that to you.”

Mr. Olson: “Now, you say that Defendant’s Exhibit 1 for identification, that the cast steel casting of which part No. 1 and part No. 2, that we have been talking about here, were made is from the same lot of steel castings as the casting used in the Champion panel raiser head in question in this suit?”

Mr. Callaway: “That is right, sir.”

Mr. Olson: “How do you know that it is the same casting; you didn’t keep any record of it at the time, did you? I mean, you didn’t mark this particular casting, or part of the casting, and mark the part that was shipped out to California, so that you know that they are both from the same [258] batch of steel castings, did you?”

Mr. Callaway: “We did not.”

Mr. Olson: “You are just depending on your memory?”

Mr. Callaway: “No; we ordered a certain amount of castings at that time, and I believe the number of castings ordered at that time from this company was 50. Of that lot we still have three or four castings left.”

Mr. Olson: “Now, you did buy castings from other companies at about the time you ordered these

(Deposition of William Victor Knourek.)

castings from this company out in Rockford,—what was the name of the company?"

Mr. Callaway: "Gunite."

Mr. Olson: "——Gunite, isn't that right?"

Mr. Callaway: "Not this type of casting."

Mr. Olson: "Didn't you ever order this type of casting from any other company?"

Mr. Callaway: "We have; in fact, we have another order of castings with another company at this time. We always order our castings ahead."

Mr. Olson: "Now, the invoice number, by the way, on the shipment of this particular Champion panel raiser head in question, your invoice number is B 67519; is that correct?"

Mr. Callaway: "It is."

Mr. Olson: "And aside from the casting used in that panel raiser head, you manufactured or fabricated all the other parts; [259] is that correct?"

Mr. Callaway: "We have."

Mr. Olson: "Now, parts No. 1 and No. 2, meaning that part No. 1 is the part that fits directly over the shaft, and which consists of a bore through a sleeve at the end of which sleeve there are mounted three arms, on each of which arms is mounted a cutter with an adjustable blade and two bolts to hold the cutter in place on the arm; is that right?"

Mr. Callaway: "That is a knife."

Mr. Olson: "I call it a cutter, you call it a knife?"

Mr. Callaway: "That's right."

(Deposition of William Victor Knourek.)

Mr. Olson: "This is all cast in one piece, the three arms and the sleeve."

Mr. Callaway: "That is right."

Mr. Olson: "And unit is made of what kind of steel?"

Mr. Callaway: "The main castings are made out of cast steel, and the knives are made out of high-speed steel."

Mr. Olson: "The knives, however, are separate; they are separate items, they are not part of the original casting?"

Mr. Callaway: "No, they are not."

Mr. Olson: "But the arms and the sleeve are all one casting and all one material; that is cast steel, is that correct?" [260]

Mr. Callaway: "That is right."

Mr. Olson: "This particular unit; that is, this Champion panel raiser head in question in this suit was designed by your company?"

Mr. Callaway: "That is right."

Mr. Olson: "And your heads are sold throughout the United States, including California, and you sold this one in California, didn't you?"

Mr. Callaway: "That is right."

Mr. Lopardo: "He didn't sell it in California."

Mr. Olson: "Well, it was sold to a customer in California."

Mr. Lopardo: "That is right."

Mr. Olson: "How do you sell your Champion panel raiser heads?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "We advertise them in our catalog, and they are advertised in all the national woodworking magazines."

Mr. Olson: "And this particular type of Champion panel raiser head was listed and was advertised in your 1945 catalog, Series K; isn't that correct?"

Mr. Callaway: "That is correct."

Mr. Olson: "And that catalog bore on its face, or within, the name of your company, Woodworkers Tool Works, Inc., 222 South Jefferson Street, Chicago, Illinois; is that correct?" [261]

Mr. Callaway: "That is right, sir."

Mr. Olson: "And the order for the particular Champion panel raiser head in question, you say, was taken or received by you from Woodworkers Supply Company; and you were directed by them to ship it to the Selby Company, 1101 West Victory Boulevard, Burbank, California; is that correct?"

Mr. Callaway: "That is right."

Mr. Olson: "And the Woodworkers Supply Company address was then 1222 Santa Fe Avenue, Los Angeles, California?"

Mr. Callaway: "That is correct."

Mr. Olson: "I note that your invoice shows the address at 1222 Santa Fe Avenue, Chicago, Illinois; but that is just a stenographer's error, isn't it?"

Mr. Callaway: "It is, sir."

Mr. Olson: "Are you familiar with the double spindle shaper manufactured by C. O. Porter Company, Grand Rapids, Michigan, Model 6?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "I have a general idea what that machine is, and what it looks like; they are all alike."

Mr. Olson: "And your Champion panel raiser head can be mounted and will operate properly on that double spindle shaper made by the Porter Company, will it not?"

Mr. Callaway: "If their spindle is long enough, yes."

Mr. Olson: "Well, now, you have no personal knowledge or recollection of the particular Champion panel raiser head [262] in question, do you; you don't remember that particular one, out of all those you made?"

Mr. Callaway: "I do not."

Mr. Olson: "Who is your agent for selling these particular Champion panel raiser heads, or any other articles made by you, in California?"

Mr. Callaway: "We have no agents in California."

Mr. Olson: "No one at all?"

Mr. Callaway: "Nowhere in the United States or Europe, do we have any agents."

Mr. Olson: "You do not maintain or keep any manufacturers' agents, so-called?"

Mr. Callaway: "We do not."

Mr. Olson: "Nor factory representatives?"

Mr. Callaway: "No, sir."

Mr. Olson: "You have only a salesman?"

Mr. Callaway: "Where?"

(Deposition of William Victor Knourek.)

Mr. Olson: "Well, I understood you to say that a while ago."

Mr. Callaway: "We have a salesman—our salesman works out of our Chicago office, which is the only office we have."

Mr. Olson: "And does he travel in California?"

Mr. Callaway: "He does not; he travels the state of Illinois——"

Mr. Olson: "You solicit orders, then, through the use of [263] a catalog, throughout the United States; is that correct?"

Mr. Callaway: "We do."

Mr. Olson: "And in the particular instance in question, I am talking about the sale now of this particular Champion panel raiser head, that order came to you from the Woodworkers Supply Company in Los Angeles?"

Mr. Callaway: "That is right."

Mr. Olson: "And did you sell the item to them, or did you sell it to the Selby Company?"

Mr. Callaway: "I sold the item to the Woodworkers Supply Company."

Mr. Olson: "Did you bill them?"

Mr. Callaway: "I did."

Mr. Olson: "Did they pay for it, or did the Selby Company pay for it?"

Mr. Callaway: "I am pretty sure that head is not paid for as yet; they are holding it up; but they have paid for other heads they have since ordered."

Mr. Olson: "Whom do you mean by 'they'?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "Woodworkers Supply Company."

Mr. Olson: "Didn't Woodworkers Supply Company inform you that they considered this head defective?"

Mr. Lopardo: I object to that on the ground it is immaterial and irrelevant and does not tend to prove or disprove any issue in this case. [264]

The Court: Objection sustained.

Mr. Olson: "Well, on what basis, then, did they refuse to pay for it?"

Mr. Callaway: "They refused to pay for the head because of this trouble they had; but I don't recall them saying the head was defective."

Mr. Olson: "They never informed you that it was defective?"

Mr. Callaway: "Let me see my records:—"

Mr. Olson: "Before you look at you records, do you have any independent recollection of whether they ever informed you that this head was defective?"

Mr. Callaway: "Well, they must have said something to that effect."

Mr. Olson: "It has now been fifteen months since you shipped the head, hasn't it?"

Mr. Callaway: "That is why I am not sure."

Mr. Olson: "Well, were you ever informed by anyone at Selby—"

Mr. Lopardo: Just a moment. You skipped an objection. Your Honor, we object to all this mate-

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rial since the last time I objected on the ground it is immaterial. It don't tend to prove or disprove anything in the case. We make the motion that testimony be stricken. It was given after our objection was sustained. At that time, of course, they had [265] no way of ruling on it.

The Court: Well, there is no objection before the court as to the subsequent questions.

Mr. Lopardo: There is now, your Honor. It is in the record. Mr. Hubbard made it at that time. I am repeating it right now, as to all the previous questions.

The Court: All right. The motion will be granted.

Mr. Olson: "Well, were you ever informed by anyone at Selby that the head was defective, or did they ever claim that it was defective?"

Mr. Callaway: "I don't know."

Mr. Olson: "Can you look at your records and tell?"

Mr. Callaway: "Yes, if I have something in writing to look at; that is fifteen months ago, I can't remember."

Mr. Olson: "Look at the record, then."

Mr. Lopardo: Your Honor, that is following along the same line.

The Court: I will sustain the entire objection.

Mr. Olson: I will go on and check over this a minute.

The Court: I will sustain the objection to any inquiry about any complaint.

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Mr. Olson: I think we can start further down on page 27. Is that satisfactory?

Mr. Callaway: You can start there, and we will see.

Mr. Olson: It is off the subject. [266]

Mr. Lopardo: Go ahead.

Mr. Olson: I think that gets out of that field. The middle of page 27.

“Did you have anybody make an investigation of this particular head in question here, to determine whether it was or was not defective, after the claim came up that it was defective.”

Mr. Callaway: “We had nobody over to examine the head.”

Mr. Lopardo: I object to that. It is immaterial. It doesn't tend to prove or disprove anything as to whether this one particular head was defective at the time it was shipped. I make a motion to strike it on that ground.

The Court: I think the objection is good because it is not cross-examination.

Mr. Olson: This is cross-examination.

The Court: It is not proper cross-examination.

Mr. Olson: I see.

The Court: The man was not asked to testify as to any inspection. That is, unless you are making him your own witness. He testified very simply. I do not know what your lawyer did to spread this over 189 pages. He was trying to prove something that was not asked on direct examination. If you

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want to offer it as a part of your proof, all right.

This Mr. Knourek was asked one thing, the origin of this. [267] I allowed it only to the extent of his saying he bought it from another concern. That is all he testified to. The rest of it is absolutely not proper cross-examination.

Mr. Olson: I am checking now.

The Court: I realize that lawyers, when taking depositions, want to put in everything that a lawyer will need.

Mr. Olson: May I read this, and make him my witness on direct?

The Court: Not now. You can offer that later on as part of direct, part of your proof on rebuttal.

Mr. Olson: That is what I will do.

The Court: We have to keep the continuity of this case and see where we stand. Any portion of the deposition that is taken out as not proper at this time, you may reoffer it and then they may object, upon other grounds.

Mr. Olson: I see. Then let's see how far we skip here. That is an objection down to page 27. There is no objection after page 29. Starting at page 29——

Mr. Lopardo: At the bottom of page 28 he makes that objection.

Mr. Olson: That is after that objection. That isn't an objection to the testimony going on later. On page 29, Mr. Callaway:

"Is there anybody with your company that has any direct knowledge,—that was the question."

(Deposition of William Victor Knourek.)

Mr. Callaway: "Oh, no, sir."

Mr. Olson: "I am talking about the head now."

Mr. Callaway: "No, sir."

Mr. Olson: "They have no direct knowledge, as far as you know?"

Mr. Callaway: "We did not see it at all, and we have not seen it to this day, the head itself."

Mr. Olson: "When you obtained these castings from the Gunito Company of Rockford, what tests did you make of the castings, any,—or your company?"

Mr. Callaway: "I think that should be answered by my superintendent."

Mr. Olson: "Well, do you know?"

Mr. Callaway: "I don't know."

Mr. Olson: "Were any tests made; do you know that?"

Mr. Callaway: "I don't know."

Mr. Olson: "What inspection did you make of those heads and castings?"

Mr. Callaway: "That can be answered by my superintendent also."

Mr. Olson: "Can you not answer?"

Mr. Callaway: "Well, I can say that that head, during the process of manufacturing, was inspected at least seven or eight times."

Mr. Olson: "Not by you, however, or your company?" [269]

Mr. Callaway: "I don't know whether I inspected that head, or not."

(Deposition of William Victor Knourek.)

Mr. Olson: "Did anybody with your company inspect it?"

Mr. Callaway: "Yes."

Mr. Olson: "Who was that?"

Mr. Callaway: "Well, our superintendent."

Mr. Olson: "You don't know that of your own personal knowledge, do you?"

Mr. Callaway: "I do."

The Court: This man is putting up a strawman and knocking him down, trying to ask the man if he inspected it. He said, "No, my superintendent inspected it."

He said, "Then you did not do it?"

You are wasting a lot of time.

Mr. Olson: "You were there when he inspected them?"

Mr. Callaway: "No, but he has strict orders to inspect every manufactured product that leaves our shop."

Mr. Olson: "But you don't know whether he carried out those orders in the case of this particular casting, do you,—yes or no, please?—Well, if you were not there, there is no way you can know."

Mr. Callaway: "That is right; I would not know."

Mr. Olson: "Now, it was your custom or practice to make tests and to make inspections; but you don't know what tests and what inspections were made in this case?" [270]

Mr. Callaway: "That is right."

(Deposition of William Victor Knourek.)

Mr. Olson: "Now, what would the inspection or tests that are ordinarily made reveal, of the castings, I mean?"

Mr. Callaway: "If the casting is defective we can see it immediately, when it comes in its rough state; and if there are any defects we can also tell later, when we start making cuts on the casting."

Mr. Olson: "By cuts you mean machining?"

Mr. Callaway: "Machining; yes, sir."

Mr. Olson: "And the machining is done to smooth the casting up, is it?"

Mr. Callaway: "That is right, sir."

Mr. Olson: "Machining, in layman's language, means shaping it up in the form that you desire?"

Mr. Callaway: "That is right."

Mr. Olson: "And you can tell by your inspection and your tests whether it is a sound casting; is that correct?"

Mr. Callaway: "Most of the time we can."

Mr. Olson: "And what are the tests and inspections given to castings by your company?"

Mr. Callaway: "I think my foreman should answer that."

Mr. Olson: "Don't you know?—We are not taking his deposition now."

Mr. Callaway: "I know that he is running my shop, and I hold him responsible." [271]

Mr. Olson: "What we are trying to find out is what you know."

Mr. Lopardo: That is objected to.

(Deposition of William Victor Knourek.)

The Court: I will sustain the objection, the whole line of argument. He is badgering a man because he says he does not know. The next deposition is of the superintendent?

Mr. Lopardo: That is right.

Mr. Callaway: Yes.

Mr. Lopardo: He is the expert.

Mr. Olson: "Well, he said there were tests made; and if there were tests, he should know what they are."

Mr. Callaway: "What tests he made, I don't know,—about his examinations; I know they were examined."

Mr. Olson: "By examined, you mean inspected?"

Mr. Callaway: "Inspected."

Mr. Olson: "What is the character of that inspection; what did he look for?"

Mr. Callaway: "Defects, flaws, size and appearance, dimensions, whether or not the tool is complete."

Mr. Olson: "Now, with respect to defects in the castings, what would such an inspection or examination reveal?"

Mr. Lopardo: There is an objection on the ground it has already been covered; asked and answered.

The Court: The objection is sustained, in view of the fact the witness stated he did not make the inspection and [272] does not know. Also, because the witness did not make the inspection you are

(Deposition of William Victor Knourek.)

wasting the court's time, having a man ask fifty questions to which the witness says he does not know.

Mr. Olson: Starting on page 33, "Then what could be seen by your inspection, in the way of defects?"

Mr. Callaway: "Well, a crack in the casting."

Mr. Olson: "Porosity?"

Mr. Callaway: "Porosity."

Mr. Olson: "Blow-holes?"

Mr. Callaway: "Blow-holes."

Mr. Olson: "Segregation of the metals?"

Mr. Callaway: "No."

Mr. Olson: "That could not be seen by the naked eye?"

Mr. Callaway: "You would not have any segregation of the metal in a casting; it is poured hot and it just flows together."

Mr. Olson: I am not going to read that.

Mr. Lopardo: I was going to object to it.

Mr. Olson: There is no sense in it. The top of page 35.

"You know, do you not, that a defective casting which had in it a blow-hole or an excess of silicon or phosphorus or sulphur would be liable to break or disintegrate when operated at high speed, do you not?"

Mr. Callaway, that is the top of page 35.

Mr. Callaway: I am looking at it.

Mr. Olson: Pardon me.

(Deposition of William Victor Knourek.)

“If it had one of those defects it would be apt to break?”

Mr. Callaway: “No.”

Mr. Olson: “It could break?”

Mr. Callaway: “Yes.”

Mr. Olson: “And it would be more apt to break if it had one of those defects than if it had none of those defects; isn’t that correct?”

Mr. Callaway: “That is correct.”

Mr. Olson: “Of course, in all of these questions I have been talking about a casting from which one of your Champion panel raiser heads was made; you understand that?”

Mr. Callaway: “I do, sir.”

Mr. Olson: I won’t ask that.

Mr. Lopardo: Your Honor, he asks the same question about another technical matter, that a blow-hole is a void, and I object.

Mr. Olson: That is the purpose——

Mr. Lopardo: I want to bring before the Court——

Mr. Olson: I haven’t asked it. I understand it would [274] be sustained. There is no sense in taking the Court’s time.

Page 37, Mr. Callaway.

Mr. Callaway: All right.

Mr. Olson: “It was not the practice of your company, at the time the particular panel raiser head in question was made, to conduct tests of the castings for either blow-holes, or voids, or gas pockets; is that correct?”

(Deposition of William Victor Knourek.)

Mr. Lopardo: I will object to that question on the ground it is a multisided question. It doesn't ask for one answer, but several. On the further ground it is not within the scope of direct examination.

The Court: Objection sustained.

Mr. Olson: He testified on direct examination about castings, your Honor, and holes in them.

The Court: No, he did not. The cross-examiner starts to ask him and then cross-examine him about his own questions. That is not proper cross-examination.

Mr. Olson: I will get it on the direct. This is sort of awkward. Page 38.

"Then, do I understand correctly that at the time the Champion panel raiser head was manufactured by your company you made no tests or examinations, other than those for blow-holes?"

Mr. Lopardo: I object. That is not what the witness [275] testified to. It wasn't testified on direct examination, and it is beyond the scope of direct.

Mr. Olson: I asked if he understood that was the question.

Mr. Lopardo: The question is improper. It doesn't make any difference if the witness understood it or not, your Honor.

The Court: Yes. The objection is sustained.

Mr. Olson: At the bottom of page 38.

"And you relied upon the tests and inspections made by the foundry?"

(Deposition of William Victor Knourek.)

Mr. Lopardo: Your Honor——

Mr. Olson: There is no objection in the record.

Mr. Lopardo: Just a minute. You are starting out in the middle of a page here, without any——

Mr. Olson: I will read back, then, if you want me to, without objection.

Mr. Lopardo: No. Your Honor, none of this matter is within the scope of the direct examination. The objections have been sustained repeatedly.

The Court: I will sustain the objection. It is quite apparent the cross-examiner was building up a case, to show this man relied on something. That is not the case before us.

Mr. Olson: I can take that on rebuttal. [276]

The Court: You will try to. After all, a man has a right to rely on his superintendent for inspections.

Mr. Olson: All I want to know, your Honor, is do I get a chance to read this on rebuttal, the part that we are not reading now?

The Court: All right.

Mr. Olson: I don't care when it is read. It looks like I will have to read it all on rebuttal.

Mr. Lopardo: Go to page 60.

Mr. Olson: I will read it all on rebuttal and save all these objections.

The Court: By your making the statement and my not answering, I am not stating you will be allowed to, if objection is made. I do not want you to——

(Deposition of William Victor Knourek.)

Mr. Olson: As I understand your Honor, so we understand——

The Court: I have already ruled there is nothing to understand, no understanding at all.

Mr. Olson: I don't understand the ruling.

The Court: I am merely ruling on objections. I am not asking you to stop, if you do not want to stop. If you want to stop, stop. Do not stop and give me a ground I may not approve of.

Mr. Olson: I don't mean to do it. I had better go on. I don't want to stop then. We will just go on.

Mr. Callaway: What page? [277]

Mr. Olson: I am just trying to find out. Page 39.

The Court: If objections are made in the record and I sustain them, I am not going to let you bring that in as part of your case. I want you to know that. That is not the rule.

In other words, that is excluded, as though I had not heard it. You are not going to be allowed to bring it back and say you want it as part of your case.

Mr. Olson: No. What I want to do, if you sustain the objections now, I understand it is because it is outside the realm of cross-examination, but if that witness were here I would have the chance to——

The Court: He was subject to subpoena. You could have brought him here.

Mr. Olson: New York.

(Deposition of William Victor Knourek.)

The Court: The subpoena of this court extends to every part of the United States.

Mr. Olson: As I understand your Honor to have told me earlier, when we were on page 27, it was that if I wanted to bring that in on rebuttal that it was all right.

The Court: Subject to exceptions. I am not making rulings in advance.

Mr. Olson: I know.

The Court: I am not making rulings in advance. If they do not object to it, I will rule on it at the time. [278]

Mr. Olson: We had better go on. I want to get as much of this in as I can.

The Court: Go ahead.

Mr. Callaway: Could I get a drink of water?

Mr. Olson: I would like one, too.

The Court: To correct the record, I want to say that that statement was made in conjunction with the cutting in questions, and not with these other questions. I could not bind these defendants by erroneous testimony that has been brought in which I have not allowed. I am not supposed to even see it, to see what it is.

Mr. Olson: You mean the cutting in questions on direct?

The Court: Those are the only ones.

Mr. Olson: We will have to go on and take the objections as they arise.

“No, maybe I don’t make it clear: Were the

(Deposition of William Victor Knourek.)

castings; that is, the metal that was in the castings, they were bought by you from Gunité Foundries, isn't that right?"

Mr. Callaway: "Yes, sir; we sent our pattern down to the Gunité Foundries and wanted so many castings made of each pattern, of a certain type of steel, which was specified on our order."

Mr. Olson: "Did you have your own foundry at the time you made up this Champion panel raiser head in question?"

Mr. Callaway: "No." [279]

Mr. Olson: "Did your company ever have its own foundry?"

Mr. Callaway: "Never."

Mr. Olson: "And your company never X-rayed or magnafluxed the castings from which this particular Champion panel raiser head was made; is that correct?"

Mr. Callaway: "No, sir."

Mr. Olson: "Do you know whether an open hearth or an electric furnace was used in casting these particular castings in question?"

Mr. Callaway: "I don't know."

Mr. Olson: "Do you know what was the method of casting these particular castings?"

Mr. Callaway: "I don't know."

Mr. Olson: "You don't know whether steel molds or centrifugal casts were used?"

Mr. Lopardo: I am going to object on the ground none of this is competent. It is not material.

(Deposition of William Victor Knourek.)

The Court: Objection sustained.

Mr. Lopardo: I make a motion to strike all of it for that reason.

Mr. Olson: "Do you know what the exact procedure was that was employed by the Gunito Foundries in making this particular casting?"

Mr. Callaway: "No."

Mr. Olson: "You don't know what heat treatment they used?" [280]

Mr. Lopardo: I object on the ground it is immaterial.

The Court: The objection is sustained.

Mr. Olson: "Who did the machining of this particular panel head in question?"

Mr. Callaway: "That should be answered by my foreman."

Mr. Olson: "Would your company do it, or some other company?"

Mr. Callaway: "Our company manufactured the entire head, from the casting which we purchased."

Mr. Olson: "And did the machining?"

Mr. Callaway: "We did."

Mr. Olson: "Now, isn't it a common occurrence in machining this type of casting to find blow-holes?"

Mr. Callaway: "Very uncommon."

Mr. Olson: "What is done with the casting when blow-holes are discovered?"

Mr. Callaway: "They are immediately thrown on the junk pile."

(Deposition of William Victor Knourek.)

Mr. Olson: Page 42, Mr. Callaway.

“Are the blow-holes easily discovered after the casting is machined?”

Mr. Callaway: I haven’t found it.

Mr. Olson: Page 42, about three or four lines down.

Mr. Lopardo: I object to that, your Honor, on the ground it is not within the scope of direct examination. [281]

The Court: Yes. The objection will be sustained.

Mr. Olson: “After assembling the panel head; that is, after placing the knives in proper position on the casting, and assembling the entire panel head, what tests or inspection are made on the whole assembled unit before it is sent out to be sold?”

Mr. Callaway: “We have several different inspections that this head goes through from the time we receive and check in the casting until the time it leaves our shipping room.”

Mr. Olson: “Will you describe those?”

Mr. Callaway: “The castings come in and they are weighed and counted, examined by one of the receiving clerks. The castings are then taken to the third floor of our shop, turned over to our foreman, Mr. Meissner; and he, in turn, checks the weight and enters that on the carbon copy of the order he ordered this merchandise with.”

Mr. Olson: “You are talking now about the order for the casting?”

Mr. Callaway: “Yes.”

(Deposition of William Victor Knourek.)

Mr. Olson: "What is the significance of the weight of the casting?"

Mr. Callaway: "No significance whatsoever."

Mr. Olson: "Then, why is the weight taken?"

Mr. Callaway: "We buy this by the pound."

Mr. Olson: "How long have you been in the particular [282] line of work that you are in now?—I understand that is the manufacture of machine tools, including, among others, the Champion panel raiser head; is that right?"

Mr. Callaway: "Yes, sir; I have been connected with Woodworkers Tool Works since 1928; during which time I worked in all the departments of the shop, having a thorough knowledge of all operations which take place in the manufacturing of our tools."

Mr. Olson: "Including, I assume, the inspection and examination of the tools after they are finished; is that right?"

Mr. Callaway: "Yes, sir."

Mr. Olson: "And you know, do you not, that if a casting contains blow-holes, and that casting is used in the making of a panel raiser head, that during the ordinary operation of the raiser head a blow-hole is apt to cause the raiser head to explode or disintegrate, do you?"

Mr. Callaway: "No, sir; I do not. We have made holes in castings larger than those caused by blow-holes, and giving them a great deal of abuse, trying to break off those prongs; and we were un-

(Deposition of William Victor Knourek.)

able to do so with a six pound hammer, swinging this hammer with both hands."

Mr. Olson: "But you do know if the hole was large enough it would be very easy to break off the prongs?"

Mr. Callaway: "If the blow-hole was large enough you [283] would be able to see it; and in this case, where the blow-hole was supposed to be, if the blow-hole was large enough that part of the prong would be separated from the casting."

Mr. Olson: "Now, by the prong, you are now speaking of that part of the panel raiser head upon which the cutting blades are mounted?"

Mr. Callaway: "That's right."

Mr. Olson: Page 48, at the bottom. "Your company recognizes that unless the machine tools put out by it are structurally sound, that the use of those tools may constitute a danger to the operator; is that correct?"

Mr. Callaway: "That is correct."

Mr. Olson: "And that, among other reasons, is the purpose of the examination and inspections you make of your various machine tools, including the Champion panel raiser head; is that correct?"

Mr. Callaway: "That is right, sir."

Mr. Olson: "Now, I believe you said that you had been 21 years, or thereabouts, since 1928, I think you said, with the Woodworkers Tool Works, in various capacities?"

Mr. Callaway: "That is right."

(Deposition of William Victor Knourek.)

Mr. Olson: "And have you worked in every division or department of the shop?"

Mr. Callaway: "That is correct."

Mr. Olson: "And many of those in the office, I assume; [284] is that right?"

Mr. Callaway: "Very little office work."

Mr. Olson: "Practically all production work?"

Mr. Callaway: "That is right."

Mr. Olson: "At any rate, you are thoroughly familiar with the various phases of the manufacture of machine tools made by your company, including the Champion panel raiser head?"

Mr. Callaway: "That is right."

Mr. Olson: "And you are also thoroughly familiar with the various steps and methods used in testing and inspecting and examining those tools, from one phase or one step; that is, from the beginning of the manufacturing process down until the finished product is taken out, turned out; is that correct?"

Mr. Callaway: "That is right."

Mr. Olson: Then there is a lot of squabbling.
Page 55, Mr. Callaway.

"Now, a small blow-hole might not have any effect on the casting at all, is that right?"

Mr. Callaway: "That is right."

Mr. Olson: "But a large blow-hole might have a serious effect, and might cause a grave structural defect?"

Mr. Callaway: "Yes."

(Deposition of William Victor Knourek.)

Mr. Olson: "And it would depend on the size of the blow-hole, as to whether it constituted a structural defect, or [285] not?"

Mr. Callaway: "But a blow-hole that large would be detected in the machining of the casting."

Mr. Olson: Page 59, Mr. Callaway.

"One is blow-holes at the point of break; the second is high phosphorus; and the third is high silicon content; could those cause a structural weakness?"

Mr. Callaway: "I answered, I don't know."

Mr. Olson: "In the casting?"

Mr. Callaway: "I don't know."

Mr. Olson: "Yet, you have 21 years in the machine tool business?"

Mr. Callaway: "That is right."

Mr. Olson: "And you have conducted examinations and inspections of castings, including Champion panel raiser heads such as the one in question here?"

Mr. Callaway: "That is right."

Mr. Olson: "And yet you say you don't know that would cause a dangerous condition?"

Mr. Callaway: "I don't know."

Mr. Lopardo: Now, redirect examination, on page 60.

Redirect Examination

"The castings which were used in the panel raiser head in question, that was purchased from a reputable manufacturer, was it not?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "They were." [286]

Mr. Olson: I object to that question and make a motion to strike on the ground that it is irrelevant and immaterial.

The Court: That is along the same line. The objection is sustained.

Mr. Lopardo: "Furthermore, had you ever had any trouble with any castings which you had purchased from this company?"

Mr. Callaway: "Never."

Mr. Olson: I object on the same grounds.

The Court: The objection is sustained.

Mr. Lopardo: Page 62.

"In the manufacture of your product here, you mentioned certain inspections; these inspections are carried out during the entire manufacture, is that correct?"

Mr. Callaway: "That is right."

Mr. Lopardo: "And these inspections are made to determine that the casting which is used is in good condition, and will withstand the pressure to which it will be subjected?"

Mr. Callaway: "It will more than stand the pressure; that is a very light cut."

Mr. Lopardo: "And in determining whether or not these castings would stand the pressure which would be required of them, in the use for which they are manufactured, have you made certain tests; namely, drilling holes through the arms to determine whether or not that would weaken the

(Deposition of William Victor Knourek.)
arms [288] to an extent that it would break if used for the purpose for which manufactured?"

Mr. Olson: I object to that as leading and suggestive. Secondly, the test suggested and assumed is irrelevant, and the results thereof would be immaterial and irrelevant to any issue in this case. Thirdly, there is no comparison of any conditions under which such tests would be made and the conditions under which the particular accident in question here is alleged to have occurred.

The Court: I will sustain the objection.

Mr. Lopardo: Starting on page 64 at the top:

"When it comes in, that is inspected by the clerk; is that correct?"

Mr. Callaway: "That is right."

Mr. Lopardo: "From there where does the casting go?"

Mr. Callaway: "It goes to the shop, and the foreman——"

Mr. Lopardo: "And who is the foreman?"

Mr. Callaway: "Mr. Charles Meissner."

Mr. Lopardo: "How long has Mr. Meissner been with your company?"

Mr. Callaway: "Five years."

Mr. Lopardo: "What is his background, is he a skilled workman or——"

Mr. Callaway: "Mr. Meissner is regarded as a toolmaker; and before working for us he worked for the Chrysler Corporation, [288] I believe; and prior to that I believe it was 15 years for some other concern."

(Deposition of William Victor Knourek.)

Mr. Lopardo: "Have you given instructions to Mr. Meissner and to your other employees regarding what they are to do during the process of completing this casting, into a head?"

Mr. Callaway: "We have made this tool——"

Mr. Olson: That can be answered yes or no.

Mr. Lopardo: "Whether you have given them instructions?"

Mr. Callaway: "Yes."

Mr. Lopardo: "Have you given him any instructions regarding—what are those instructions?"

Mr. Callaway: "We have been making this head for over 20 years; and we have a sample of most everything we manufacture. When these heads are made we just take our sample head we have, and we give it to Mr. Meissner, who is a toolmaker and knows just what to do; and he does not have to be told what to do."

Mr. Lopardo: "Yes?"

Mr. Callaway: "Upon seeing the head he knows what to do."

Mr. Lopardo: "What I mean is, do you have standing instructions to all your working force what they are to look for in the process?"

Mr. Callaway: "That is right."

Mr. Lopardo: "What are they to look for?" [289]

Mr. Callaway: "Well, they are to look for flaws in the casting, upon machining the casting; if they hit any blow-holes they are supposed to scrap the

(Deposition of William Victor Knourek.)

casting immediately. And then the most important thing is size; or one of the important things is size, such as the hole diameter, and other different measurements of the tool."

Mr. Lopardo: "I believe you stated on cross-examination that there are around seven inspections that are made in the process."

Mr. Callaway: "At least seven; even more."

Mr. Lopardo: "And those are made by competent and skilled workmen, are they not?"

Mr. Callaway: "Mostly skilled workmen; the receiving clerk that makes the first inspection, we would not call him a skilled workman; but from then on—and then the shipping clerk that makes the final inspection; but all in between are skilled workmen."

Mr. Lopardo: "Then you have five inspections here that are made by skilled workmen?"

Mr. Callaway: "That is right."

Mr. Lopardo: "You were asked in that long question whether or not an accident would occur to one of these panel raiser heads; if the panel raiser head were improperly installed, might that cause it to break?"

Mr. Callaway: "It might." [290]

Mr. Lopardo: "I believe you were asked here if that were installed upon a double spindle shaper manufactured by C. O. Porter Company; now, if they were improperly installed, would that cause it to break?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "Yes."

Mr. Lopardo: "In other words, the panel raiser head would have to be installed at the proper—there would have to be proper clearance, would there?"

Mr. Callaway: "There would; there would have to be proper clearance."

Mr. Olson: Let him tell what would have to be done.

Mr. Callaway: "The two castings would have to be staggered, so they could not hit; and the set screws would have to be tightened securely."

Mr. Lopardo: "If part 1 and part 2 of Defendant's Exhibit 1 were properly installed, what would be the position of the arms of each part?"

Mr. Olson: "With relation to each other?"

Mr. Lopardo: "Yes."

Mr. Callaway: "They would be staggered; they would not be aligned."

Mr. Olson: "He did cover that; he said one arm would be midway between the two on the other part."

Mr. Lopardo: "If they were exactly opposite each other, what would that indicate to you?" [291]

Mr. Callaway: "It would indicate that the tool has been misused; and the way we manufacture that head, it is impossible to line them up opposite one another."

Mr. Lopardo: "If they were lined up opposite other, what would that indicate?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That the tool was misused, or an accident was had, of some kind."

Mr. Lopardo: "Is it possible to line them up exactly opposite each other, without breaking?"

Mr. Callaway: "The only way you can line those up is by breaking the tool, or shearing the pin and moving the set screws from the flats of the sleeve; and this being done, it would have to be a terrific shock to the tool in order to be powerful enough to do that; it could not be done by cutting a panel on a door, which is a very light cut, as far as wood-working is concerned."

Mr. Lopardo: "Assuming for the purposes of this question that you had a small air pocket in one of these arms which was incapable of being discerned by visible inspection, would that break in normal use?"

Mr. Olson: I will object to the question, unless the size of the air pocket is more definitely defined.

The Court: The objection is sustained.

Mr. Lopardo: "Well, an air pocket of the size which counsel suggested in his hypothetical question." [292]

Mr. Olson: "I did not suggest a size."

The Court: All right. That will have to be taken in conjunction with the other. You may answer.

Mr. Callaway: "That is right."

Mr. Olson: "I think we could agree if it were tiny it would have no effect, unless there were a lot of them; is that right?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right."

Mr. Lopardo: "If you had an air pocket which extended directly through the arm, from one side to the other, if it were directly in the center, would that still be able to withstand normal use?"

Mr. Callaway: "Due to the light cut it is making on a panel, I am sure that if there were such a blow-hole it would not have any effect on the tool whatsoever."

Mr. Lopardo: "That is substantiated by the tests which you have made, in these tests?"

Mr. Callaway: "That is right."

Mr. Lopardo: "In other words, the size of the castings which you used——"

Mr. Callaway: "Now, if you will notice, that blow-hole could not have been very large in here; but you will notice, they are $\frac{3}{8}$ inch cap screws; those are large holes. Back here (indicating) you have got a half-inch hole for a milled head set screw; these holes are larger than any possible hole [293] could be in this blow-hole."

Mr. Lopardo: "You mean in the arm?"

Mr. Callaway: "In the arm. If the tool did break, why didn't it break at the $\frac{3}{8}$ inch hole, or the $\frac{1}{2}$ inch hole, which is bound to weaken the casting?"

Mr. Olson: "I move that the entire answer be stricken; first, not responsive; and secondly, it constitutes mere argument or speculation of the witness. Can we agree that the answer may go out?"

(Deposition of William Victor Knourek.)

The Court: Motion denied.

Mr. Lopardo: "Why do you use steel castings, instead of some other metal?"

Mr. Callaway: "Well, we use cast steel castings because we know they are about the strongest castings you can use; and all manufacturers of heads use steel castings. For a number of years we manufactured this head out of bronze castings; and even with the bronze castings we had no breakage. And we know the steel casting is so much superior to the bronze casting, as far as strength is concerned."

Mr. Olson: "I move that the entire answer be stricken, as not responsive; secondly, irrelevant; thirdly, constituting a self-serving statement and an argument by the witness."

The Court: The motion will be denied.

Mr. Lopardo: "In other words, a casting which has been [294] machined in your shop and subjected to all of your tests would not break under ordinary use; is that what I understand you to say?"

Mr. Olson: "I object to that question, as calling for the speculation and conclusion of the witness, and irrelevant."

The Court: The objection is sustained.

Mr. Callaway: The middle of page 71.

Mr. Lopardo: "Please—what I am after—strike that question; I will ask you in a different way: In order for a casting, or one of your heads to break, it would be required that there would be a misuse of some kind; is that correct?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right."

Mr. Lopardo: "In other words, for one of those arms to break off it would be required that they had a wrench, or something else was thrown in there, and it came against it?"

Mr. Callaway: "It hit some hard object, not necessarily a wrench; but in order to break off it would have to be a terrible blow. There could be a tool left on the mill or work table of the machine, after the head it put on."

Mr. Lopardo: "Or that it was not properly installed?"

Mr. Callaway: "Was not properly installed."

Mr. Olson: At this time I object to that whole line of questioning and answers on the ground the questions are leading [295] and suggestive, self-serving, and call for the witness to give pure conclusions and opinion.

The Court: It is redirect examination.

Mr. Olson: He doesn't have the part, he hasn't seen the part.

The Court: Your correspondent brought up this entire matter. Otherwise, the testimony of this witness could have been concluded in 10 pages. So, having brought up that matter and it having gone in, we will have to allow cross-examination.

Mr. Olson: Proper cross-examination. I say it calls for conclusion and speculation on the part of the witness.

The Court: He is just as much an expert as an

(Deposition of William Victor Knourek.)

expert you produce and would ask a hypothetical question about the result of blow-holes.

Mr. Olson: This man is not an expert. He is the president of a steel company.

The Court: You can argue the effect of his testimony to the jury. The objection is overruled.

Mr. Lopardo: "You had no reason to suspect that there might be any defect in any of the merchandise which you purchased from the Gunitite people?"

Mr. Callaway: "No, sir."

Mr. Olson: I object and move that be stricken.

The Court: The objection is overruled. [296]

Mr. Lopardo: "You never had any one of these panel raiser heads break, in any prior instance?"

Mr. Olson: I object to that as being irrelevant and immaterial.

The Court: The objection will be sustained as to that.

Mr. Lopardo: That is all.

Mr. Olson: Now we are back on recross-examination.

The Court: All right.

Recross-Examination

Mr. Olson: "Well, now, Mr. Knourek, you have not personally, you have no personal knowledge of whether any one of the several inspections that you say are usually made on this type of Champion panel raiser head actually were made; that is, you were not present, you did not conduct it; is that

(Deposition of William Victor Knourek.)

correct? Just answer me, do you have personal knowledge of whether inspections of this particular Champion panel raiser head were made?"

Mr. Callaway: "I have."

Mr. Olson: "You say you do? Do you remember the particular head?"

Mr. Callaway: "Do I have to answer that yes or no, or can I answer yes or no and then tell my reasons?"

Mr. Olson: "Answer yes or no, and then if you want to make an explanation—you don't have any personal recollections of that, do you, the inspection of this particular head? You have already testified you didn't know anything [297] about this particular head."

Mr. Callaway: "No, I do not have any recollection of that, but we had two or three telegrams on that head."

Mr. Olson: "That is all I want; you don't have any personal knowledge of those inspections of that head, you were not there, and you did not participate; isn't that right?"

Mr. Callaway: "I cannot answer that question."

Mr. Olson: "You don't remember, is that right?"

Mr. Callaway: "If there were telegrams coming in, I must have checked on that head."

Mr. Olson: "I am asking you if you remember in your own mind at this moment; you don't have any recollection, do you?"

Mr. Callaway: "I do not."

(Deposition of William Victor Knourek.)

Mr. Olson: "Cutting on a door; that is, raising a panel on a door, which is the type of operation that was performed when this particular head exploded and disintegrated, you say that is a light cut?"

Mr. Callaway: "Yes, sir."

Mr. Lopardo: I object to that on the ground it presumes something not in evidence, something that wasn't testified to by the witness.

Mr. Callaway: Let's waive the objection and go ahead.

The Court: Go ahead. You may answer. [298]

Mr. Callaway: "Yes, sir."

Mr. Olson: I think you read there, Mr. Callaway.

Mr. Callaway: "I would say it was a light cut; yes, sir."

Mr. Olson: "Now, you say even if there were an air pocket entirely through the arm, that that might not cause damage, or cause the arm to break; is that right?"

Mr. Callaway: "That is right, sir."

Mr. Olson: "But then if the air pocket were large enough it certainly might cause the head to break?"

Mr. Callaway: "Yes, it would."

Mr. Olson: "And any air pocket constitutes a light or a large defect, depending on the size structural defect in the arm, doesn't it—if there is an air pocket in the arm?"

Mr. Lopardo: I object to that on the ground this man hasn't been qualified as a metallurgist and—

(Deposition of William Victor Knourek.)

The Court: I think in view of the latitude I allowed you on the cross, I will allow that.

Mr. Callaway: "Yes; but how strong does that steel have to be?"

Mr. Olson: Where is that?

Mr. Callaway: Page 75, line 5.

Mr. Olson: I have the question before that.

Mr. Lopardo: He answered. [299]

Mr. Olson: "No, that is not the question; the steel, is not as strong with the air pocket as it is without; isn't that true?"

Mr. Callaway: "It all depends on the size of the air pocket."

Mr. Olson: "But if the air pockets are large, or even if they are small but they are numerous, that could weaken the arm?"

Mr. Callaway: "That is right, sir."

Mr. Olson: "And if they did weaken the arm, it could constitute a structural defect?"

Mr. Callaway: "No, sir."

Mr. Olson: "It would not be dangerous?"

Mr. Callaway: "It all depends on the size."

Mr. Olson: "Assume it would be large enough?"

Mr. Callaway: "If it would be that large we would be able to see it, and we would not have manufactured it."

Mr. Olson: "That is not a point; but if it were large it could be dangerous?"

Mr. Callaway: "Certainly."

Mr. Olson: The bottom of page 76.

(Deposition of William Victor Knourek.)

"If it were small enough it would have no effect; and if small and they were frequent enough it cause a dangerous condition?"

Mr. Callaway: "That is right." [300]

Mr. Olson: "And you recognize, in manufacturing these heads, that such dangerous conditions could exist; and that is the reason you make your inspections; is that right?"

Mr. Lopardo: I object to——

Mr. Callaway: Waive the objection, and let's go ahead.

Mr. Olson: Go ahead and answer it.

The Court: Go ahead and answer it.

Mr. Callaway: "Yes, we do."

Mr. Olson: "You make the inspections to prevent dangerous conditions, among other reasons?"

Mr. Callaway: "Yes, we do."

Mr. Olson: "And it is for the purpose of finding out dangerous conditions, among other things, that you make those inspections; is that right?"

Mr. Callaway: There is some more to the question.

Mr. Olson: "He can answer yes or no."

Mr. Callaway: "One of the many reasons."

Mr. Olson: "You have to discover if there are any dangerous conditions, is that right?"

Mr. Callaway: "I answered that."

Mr. Olson: "You answered it yes?"

Mr. Callaway: "Yes."

Mr. Olson: "All right; now, what is the par-

(Deposition of William Victor Knourek.)

particular type of steel casting used; is there any particular name, trade name—or other description other than just steel casting?" [301]

Mr. Callaway: "I don't know what it is, but is a very strong machinery steel; I think it is an SAE 1025; that is what they call it. And we have used steel with SAE 1045."

Mr. Olson: "But you don't know what kind of steel it is, definitely and precisely; is that right?"

Mr. Callaway: "Not unless I looked at my records, sir."

Mr. Olson: "You do not test the castings; that is, your company; you only inspect them?"

Mr. Lopardo: I object to that on the ground it has already been asked and answered; covered before.

Mr. Olson: Distinction between testing and inspecting.

The Court: I will overrule that objection.

Mr. Callaway: Let me see if I can find the answer. "That is right."

Mr. Olson: "Now you stated that this particular head ordinarily is used at a speed of 7500 rpm?"

Mr. Callaway: "No, I said 7200, from 3000 to 7200."

Mr. Olson: "And it could be run safely at higher speed?"

Mr. Callaway: "I don't know; but there is a possibility it could. I would not hesitate to run that machine at higher speed."

Mr. Olson: "Even up to 10,000?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right."

Mr. Olson: That is all. That takes care of that part.

The Court: All right. We will take a recess. [302]

May it be stipulated the usual admonition has been given to the jury?

Mr. Olson: So stipulated.

Mr. Callaway: So stipulated.

(A short recess was taken.)

The Court: Let the record show the jury is in the box.

Mr. Lopardo:

"CHARLES E. MEISSNER

a witness of lawful age, produced on behalf of the defendant, and being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and under oath deposed and testified as follows:

"Direct Examination

"Will you give us your full name?"

Mr. Callaway: "Charles E. Meissner."

Mr. Lopardo: "Where do you live?"

Mr. Callaway: "At 10037 South Wallace Street, Chicago."

Mr. Lopardo: "You are employed where?"

Mr. Callaway: "Woodworkers Tool Products, 222 South Jefferson, Chicago, Illinois."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "How long have you been employed there?"

Mr. Callaway: "Five years."

Mr. Lopardo: "And prior to coming to the Woodworkers Tool Products, where were you employed?"

Mr. Callaway: "Chrysler Corporation."

Mr. Lopardo: "What kind of work did you do there?" [303]

Mr. Callaway: "The same kind of work; I was tool room lead man there."

Mr. Lopardo: "A lead man is what, the same as a foreman?"

Mr. Callaway: "Tool room lead man, that is correct."

Mr. Lopardo: "Prior to that, where were you employed?"

Mr. Callaway: "I worked for F. H. Noble & Company."

Mr. Lopardo: "What did you do there?"

Mr. Callaway: "I was a tool and die maker."

Mr. Lopardo: "You have been in that line of work now altogether about how many years?"

Mr. Olson: "He has testified to three different types of work."

Mr. Callaway: "The same type of work; I was originally a toolmaker; that is my trade."

Mr. Lopardo: "And you have been in your trade about how many years?"

Mr. Callaway: "About 22 years."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "Now, at the Woodworkers Tool Works, will you tell us exactly what your duties are?"

Mr. Callaway: "I am plant superintendent there."

Mr. Lopardo: "The Woodworkers Tool Works, one of the products they manufacture is a panel raiser head; is that correct?"

Mr. Callaway: "That is one of their many items, yes."

Mr. Lopardo: "I will show you what has been identified [304] as Defendant's Exhibit 1, and ask you if that is the panel raiser head which is manufactured by the Woodworkers Tool Works?"

Mr. Callaway: "Yes."

Mr. Lopardo: "Now, will you tell us the procedure followed in the manufacturing of a panel raiser head?"

Mr. Callaway: "Do you want all those operations?"

Mr. Lopardo: "Yes."

Mr. Olson: "From the beginning."

Mr. Callaway: "From the beginning, all right: First of all, I would make out the order for these castings."

Mr. Lopardo: "You purchased the castings from whom?"

Mr. Callaway: "I purchased these castings from Gunité Foundry, Rockford, Illinois."

Mr. Lopardo: "And now, were you aware of the

(Deposition of Charles E. Meissner.)

reputation of the Gunitite Foundries in the trade?"

Mr. Callaway: "Yes, I was."

Mr. Olson: "I object to that, as being irrelevant and immaterial."

The Court: The objection is sustained.

Mr. Lopardo: "What type of castings were purchased?"

Mr. Callaway: "These were steel castings."

Mr. Lopardo: "Now, I assume that they arrived at the plant, at the Woodworkers Tool Works."

Mr. Callaway: "Yes, about in October of 1948." [305]

Mr. Lopardo: "Upon their arrival, what is done with them?"

Mr. Callaway: "I have a clerk in the tool room there who checks all these orders as they come in. He checks them for weight, and he does inspect them."

Mr. Lopardo: "Does he examine each individual casting?"

Mr. Callaway: "He does, as he weighs it, looks it over thoroughly."

Mr. Lopardo: "Now, have you given him any instructions as to what he is to look for?"

Mr. Callaway: "Yes, I have."

Mr. Lopardo: "What are those instructions?"

Mr. Callaway: "He does look for any noticeable defects that he could see."

Mr. Lopardo: "Among them, would that be cracks?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Cracks, bubbles, air bubbles, you might say air pockets."

Mr. Lopardo: "From the first arrival, where do they go from there?"

Mr. Callaway: "He gives them to me, and I put them in a storage bin."

Mr. Lopardo: "And do you do anything with them, prior to putting them in the bin?"

Mr. Callaway: "No; I just put them in the bin."

Mr. Lopardo: "And then what do you do with them?" [306]

Mr. Callaway: "Then some time later an order might come up from the office, a customer specifying a panel raiser head."

Mr. Lopardo: "They are kept there until you have an order?"

Mr. Callaway: "They are kept there until I have an order, I get these two castings for that; I look them over, and give them to an engine lathe operator."

Mr. Lopardo: "Then each of these is milled when you have an order?"

Mr. Callaway: "Yes, when I have an order; or sometimes I might even make a run of them."

Mr. Lopardo: "In the particular case, the order that you received from the Woodworkers Supply, were those made up specially or were they in stock; or do you remember that?"

Mr. Olson: "Can we stipulate that you are talking about the order, the panel raiser head that is in issue here?"

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "That is right."

Mr. Olson: "Very well."

Mr. Callaway: "That particular one was made up especially for them; I remember that distinctly."

Mr. Lopardo: "Now, will you tell us what you did in making up that particular head?"

Mr. Olson: "If you remember." [307]

Mr. Callaway: "I do remember. I wonder if I could say something off the record here: When I made this particular head I made others right along with that."

Mr. Lopardo: "That is all right; just tell how you made them."

Mr. Callaway: "In making this head I got the order, I inspected it, I gave it to the engine lathe operator."

Mr. Lopardo: "That is, you took the two castings, is that right?"

Mr. Callaway: "Two castings, yes."

Mr. Lopardo: "All right; and you gave them to the lathe operator?"

Mr. Callaway: "I gave it to the engine lathe operator. He, in turn, inspected it, looked it over thoroughly, and he chucks it up in a lathe and starts facing it."

Mr. Olson: "I object and move that the answer be stricken, unless the witness states that he saw this done, of his own personal knowledge."

Mr. Callaway: "I did see that done."

The Court: All right. He corrected himself. Go ahead.

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "All right; now proceed."

Mr. Callaway: You skipped a question.

Mr. Olson: I asked, "Did you see him inspect it?"

Mr. Callaway: "Yes. My desk is right alongside of his engine lathe." [308]

Mr. Lopardo: "All right; now proceed."

Mr. Callaway: "He faced it off; he inspected it, chucked it and faced it off, and started boring on this particular head."

Mr. Lopardo: "Now will you tell us, the first operation is facing it; is that correct?"

Mr. Callaway: "The first operation on this head, he would chuck this on an engine lathe."

Mr. Olson: "That means fastening it?"

Mr. Callaway: "Yes. He tightens it in the lathe. He faces this and bores this at the same time. He also does this one here, (indicating) faces it."

Mr. Olson: "Faces it means machines it off?"

Mr. Callaway: "Yes; he just takes a cut right across this face here. (Indicating.)"

Mr. Lopardo: "In other words, that removes all the excess rough metal that might be there?"

Mr. Callaway: "That is right."

Mr. Lopardo: "So the roughness is removed?"

Mr. Callaway: "The roughness is removed; and in doing so he would notice any imperfections that might be in that casting."

Mr. Olson: "I object to that, and move it be stricken, as a conclusion of the witness."

(Deposition of Charles E. Meissner.)

The Court: Read the question. [309]

Mr. Lopardo: "So the roughness is removed?"

Mr. Callaway: "The roughness is removed; and in doing so he would notice any imperfections that might be in that casting."

Mr. Olson: That calls for a conclusion.

The Court: It is the ordinary conclusion that anyone would make.

Mr. Olson: He is concluding what someone else would do.

The Court: If it is what would appear to anybody, he may make that statement, even though he did not do it himself. The motion will be denied.

Mr. Lopardo: "He has instructions from you to look for any imperfections?"

Mr. Callaway: "He has, yes."

Mr. Lopardo: "Now proceed; what would he do?"

Mr. Callaway: "Faces it and bores it in each, two details."

Mr. Lopardo: "You give him instructions as to what bore?"

Mr. Callaway: "The bore is on the customer's order."

Mr. Lopardo: "All right."

Mr. Callaway: "And then he probably ran several others with this."

Mr. Lopardo: "About how long would that facing operation take?"

Mr. Callaway: "The facing operation on that, I

(Deposition of Charles E. Meissner.)

would say just the facing alone would take—it is an interrupted [310] cut—five minutes.”

Mr. Lopardo: “That would be facing on one side?”

Mr. Callaway: “That is just this one side only.”

Mr. Lopardo: “Before he moves it, would he make the bore?”

Mr. Callaway: “Yes, he would face this and bore it at the same time, while it is in the machine; so it would be at right angles.”

Mr. Lopardo: “Would the facing take place at the same time as the boring?”

Mr. Callaway: “No; that is two operations, although it would be in the machine at the same time, in this chuck.”

Mr. Lopardo: “As the facing takes place the casting is revolved, is it not?”

Mr. Callaway: “That is right.”

Mr. Lopardo: “That is at a slow rate, is it not?”

Mr. Callaway: “That is an interrupted cut; I would say a slow rate, yes.”

Mr. Lopardo: “So at the time it revolves around, the operator of the lathe can see the surface?”

Mr. Callaway: “He can.”

Mr. Lopardo: “And your instructions are that they are to observe the surface in the complete operation; is that correct?”

Mr. Callaway: “They are; that is right.” [311]

Mr. Lopardo: “Once the facing is completed on the one side, then the lathe operator does the following operation; is that correct?”

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Yes."

Mr. Lopardo: "And that would take about how long?"

Mr. Callaway: "The boring of that, that all depends on the inside diameter; that, I would say, would be ten minutes."

Mr. Lopardo: "Then after the boring is completed, what is the next operation?"

Mr. Callaway: "You must remember, he has two heads here; and he also would take this detail here (indicating) and do the same operation."

Mr. Lopardo: "This has been marked here part 1 and part 2 of Defendant's Exhibit 1;—

Mr. Callaway: "Yes."

Mr. Lopardo: "Can you indicate on Defendant's Exhibit 1 how that would be completed, or handled?"

Mr. Olson: "You mean during this operation, the boring?"

Mr. Lopardo: "Yes."

Mr. Callaway: "Of course, you want to realize that he could take either one of them and do any one first; it wouldn't make any difference."

Mr. Lopardo: "In the beginning of the operation you have two castings that will look practically the same; is [312] that it?"

Mr. Callaway: "That is right, with the exception of this. (Indicating.)"

Mr. Lopardo: "After he has completed the boring, then he would remove that, is that correct?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "That is right."

Mr. Lopardo: "And at that time is there any inspection made?"

Mr. Callaway: "Well, he would see any noticeable defects as he is machining it, because he is machining off this rough surface."

Mr. Lopardo: "What will he do after he removes the casting from the machine, after he has completed the boring?"

Mr. Callaway: "He could chuck it over and put in the other detail, either part 1 or part 2."

Mr. Olson: "I would like to enter a general objection to this entire line of testimony as to what a workman would do: First of all, being a mere conclusion of this witness, not in the form of direct testimony, and being self-serving, and as being mere testimony of a custom rather than direct testimony of matters to which this witness can testify of his own knowledge and memory."

Mr. Lopardo: Your Honor, I would like to refer back to page 84 where Mr. Johnston, who was representing the plaintiff, said, "Can we stipulate that you are talking about the order, [313] the panel raiser head that is in issue here?"

Mr. Olson: What he would do, not what he did do. Each question is what would he do then. It is custom, not what he did do.

The Court: I think the method of expression may be unfortunate. What the man is trying to do is narrate the sequence of things that the man did, ac-

(Deposition of Charles E. Meissner.)

According to instructions. He is merely describing it as though a man takes what we call the narrative present and says, "He says," and "I says," and "He says," and "I says," and so forth. He is telling something he saw, but he is using that method of expressing himself.

Mr. Olson: I see.

The Court: It is quite apparent the man is talking about various processes which were done under his direction and observation, according to his instructions.

You finally have before the court the foreman testifying to the things the other man would not testify to. The motion is denied.

Mr. Lopardo: "Now I will ask you whether or not those operations were performed on the Champion panel head which was made for the Woodworkers Supply Company?"

Mr. Olson: "If he knows; if he doesn't, he can so state."

Mr. Callaway: "Yes, that was." [314]

Mr. Lopardo: "Now, what was the next operation?"

Mr. Callaway: "Assuming that the engine lathe operator has both these details finished, he would give it back to me."

Mr. Lopardo: "Now he would take the casting, and would he perform an operation on the other side; or are they performed both sides simultaneously?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "No, one side at a time."

Mr. Lopardo: "I am indicating here, for the purpose of the record, part 2 of Defendant's Exhibit 1; in other words, the casting would have to be removed?"

Mr. Callaway: "Removed, and the other one put in."

Mr. Lopardo: "Then turned over, with the other face exposed; he would machine one side, and bore it?"

Mr. Callaway: "That is right. Then he would take this one face, (indicating) this one, and bore this inside dimension in here."

Mr. Lopardo: "Would he then proceed, or did he then proceed to face the other side?"

Mr. Olson: "I object to the question, as being leading and suggestive." That is withdrawn.

Mr. Lopardo: That is withdrawn.

Mr. Olson: Excuse me. Strike that.

Mr. Lopardo: "What did he do next?"

Mr. Callaway: "He took it out of the machine and checked [315] it over; and then he would put it on an arbor; he would face off this other side, and turn this outside diameter."

Mr. Lopardo: "Indicating part 2 of Defendant's Exhibit 1. All right; now, what was the next operation?"

Mr. Callaway: "Assuming that he is finished, there are several other little things."

Mr. Lopardo: "Then he would chuck the other casting; is that correct?"

(Deposition of Charles E. Meissner.)

Mr. Olson: If you want to skip now to where he rephrased it——

Mr. Lopardo: Where is that, now?

Mr. Olson: My man says, if you will ask it in another form, and he does ask it in another form.

Mr. Lopardo: "Now we have completed the one casting; now what would be the next operation?"

Mr. Callaway: "Assuming we have completed this part 1——"

Mr. Lopardo: "All right."

Mr. Callaway: "He would take that out of the machine, chuck up part No. 2——"

Mr. Olson: For the purpose of the record I will make the same objection, what he would do.

The Court: The man is using that method of saying what is being done.

Mr. Olson: I just want the record to persist in that [316] objection.

The Court: He chooses that mode to tell the story.

Mr. Lopardo: "Now, proceed; what was done?"

Mr. Callaway: "He would take part 1 out of the machine and put in, chuck up part No. 2. He would face that, bore it, and turn the outside dimension."

Mr. Lopardo: "Then what else?"

Mr. Callaway: "I should not have said turn the outside dimension in that one operation; that would be an impossibility."

Mr. Lopardo: "How would that be handled?"

Mr. Callaway: "That would be put on an arbor and it would be turned then."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "Have you give us the complete operation of the lathe operator, the complete operation that the lathe operator performs?"

Mr. Callaway: "Yes; he would face this angle and turn the outside dimension also on it."

Mr. Lopardo: "All right."

Mr. Callaway: "That would complete the engine lathe operator's part of the work."

Mr. Lopardo: "Then what happened. or what was done with the two units?"

Mr. Callaway: "He gives me this casting, as with this here; I look it over, and give it to a milling machine [317] operator we have there."

Mr. Lopardo: "Why do you look it over?"

Mr. Callaway: "I check it for any noticeable defects, or air bubbles that might be in there."

Mr. Olson: I am going to make the objection. It has been ruled on.

Mr. Lopardo: "The testimony which you have given here is what was done to the Champion panel head which was sold to the Woodworkers Supply Company; is that correct?"

Mr. Olson: "I object to that, as being leading and suggestive; and move both the question and answer be stricken."

The Court: Overruled.

Mr. Callaway: "Yes."

Mr. Lopardo: "You know that of your own knowledge?"

Mr. Callaway: "I do."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "You were present when that was performed?"

Mr. Callaway: "I was."

Mr. Olson: Objected to as leading and suggestive.

The Court: Overruled.

Mr. Lopardo: "Will you tell us what you did next?"

Mr. Callaway: "I looked this head over, and I gave it to the milling machine operator, who in turn——"

Mr. Olson: "What was his name?"

Mr. Callaway: "Victor Barron." [318]

Mr. Lopardo: "What did he do?"

Mr. Callaway: "He milled that slot in there, milled two flats for the set screws, put the pin in; also got a fixture out and drilled the holes necessary for the mounting of these knives on."

Mr. Lopardo: "Anything further?"

Mr. Callaway: "Of course, he checked it at the same time, before it was returned to me."

Mr. Lopardo: "That was then delivered to you, is that correct?"

Mr. Callaway: "Yes."

Mr. Lopardo: "And what did you do with it then?"

Mr. Olson: I object to that as leading and suggestive, the form of the question.

The Court: Overruled.

Mr. Lopardo: "Well, did you do anything then with it?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Yes, I check that head over, and it is also then balanced."

Mr. Lopardo: "Who did that?"

Mr. Callaway: "I do the balancing myself."

Mr. Lopardo: "And then what was done, if anything?"

Mr. Callaway: "The knives are inserted."

Mr. Olson: Go ahead.

Mr. Lopardo: "Go right ahead."

Mr. Callaway: "It is checked if there is variation. [319] I in turn check it with the order, and give it to the engine lathe operator, who mounts these knives on."

Mr. Lopardo: "All right."

Mr. Callaway: "He has a fixture or a bar there that he clamps in his lathe, and he sets the knives at that proper angle."

Mr. Lopardo: "Does he have any directions as to any inspection of any kind?"

Mr. Callaway: "Yes."

Mr. Olson: Same objection, leading and suggestive.

The Court: Overruled.

Mr. Callaway: "Yes, he has orders from me, if there is anything wrong with it to complain to me about it."

Mr. Olson: "Who is this man?"

Mr. Callaway: "That is my assistant up there, Henry Danielson."

Mr. Lopardo: "Mr. Danielson, then, he cuts the

(Deposition of Charles E. Meissner.)

holes for the cutting edges or blades; is that correct, on that operation?"

Mr. Callaway: "No, that is another operation; that has not been discussed at all."

Mr. Lopardo: "Have you told us everything he does on that operation?"

Mr. Callaway: "Those knives we make up, probably a hundred at a time." [320]

Mr. Lopardo: "Have you told us now everything that he does on that operation?"

Mr. Callaway: "I got up to his locating these knives on the machine."

Mr. Lopardo: "What does he do next?"

Mr. Callaway: "He locates these knives, checking it over; and then the head is finished. It comes back to me once more; I look it over, I check it for bore, and I know that it is properly balanced; I balance it myself. And I put this head on the finished bench."

Mr. Lopardo: "And prior to putting it on the finished bench, is there anything else that you do with it?"

Mr. Callaway: "I did leave out one operation there."

Mr. Lopardo: Will you tell us that operation?"

Mr. Callaway: "I neglected to say that these go down to the cutter, grinders; and they face off the part where the knife is clamped onto one of these arms. They, in turn, inspect it and look it over."

Mr. Lopardo: "Now, at each stage, then, it is checked——"

(Deposition of Charles E. Meissner.)

Mr. Olson: "Just a moment; the question is leading and suggestive."

The Court: Pardon?

Mr. Olson: I say the question is leading.

The Court: Read the question.

Mr. Lopardo: "At each stage, then, each of these checked——" [321]

Mr. Olson: "Just a moment; the question is leading and suggestive."

The Court: Overruled.

Mr. Lopardo: "At each stage, then, each of these is checked and examined for any defects of any kind?"

Mr. Callaway: "They are, after each operation."

Mr. Lopardo: "Now, have you told us everything that is done at each operation?"

Mr. Callaway: "Except it is balanced; and in balancing you do grind off the rough parts of metal on the back. It is also checked and inspected then, and you also have a good chance of looking it over; you are handling each one, and you are grinding on each arm."

Mr. Lopardo: "Then what is done, what is next?"

Mr. Callaway: "I did say that it was put on the finished bench; and once more I do look it over, check it for bore, size, and the customer's specifications; and then it goes downstairs to the shipping room."

Mr. Lopardo: "You use in this, is it steel casting?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "This is steel casting, yes."

Mr. Lopardo: "Why do you use steel casting?"

Mr. Callaway: "Well, steel is so much superior to any other type of metal that you would use on there, and we found it satisfactory in all the heads we have made so far."

Mr. Lopardo: "Have you replaced any heads?" [322]

Mr. Olson: I object to that, as being immaterial and irrelevant.

The Court: I will sustain the objection.

Mr. Lopardo: "Then, the claim here in question is the only one that you have ever had?"

Mr. Olson: Same objection.

The Court: Objection sustained. I want you to know this: By objecting to that you deprive yourself of the right to argue. You are not going to make any mention of that.

Mr. Olson: I am not going to make any mention——

The Court: Draw any inference from the fact that if they had made an inspection they could have discovered it.

Mr. Olson: I am afraid I don't understand the court.

The Court: Let it stand as it is. I will not do anything at all. If you make any argument that I think is improper, in view of your objection that you are objecting to the proposition they testified they have never had any complaint about breaking——

(Deposition of Charles E. Meissner.)

Mr. Olson: That is immaterial.

The Court: All right. You are not going to make any comment on that topic, then.

Mr. Olson: I am concerned with his one braking; that is all.

Mr. Lopardo: "Now we have it down at the finished bench, and from there what happens?" [323]

Mr. Callaway: "We have a boy come up with a truck several times a day, and he picks up all these finished jobs, and it goes down in the shipping room; and there it is inspected and packed and checked again."

Mr. Olson: I won't make any objection.

Mr. Lopardo: All right. "How are they packed?"

Mr. Callaway: "That I couldn't say, how they are packed."

Mr. Lopardo: "Were all of these operations performed on the Champion panel head which was shipped to Woodworkers Supply Company?"

Mr. Olson: "Do you know?"

Mr. Callaway: "Yes, they were."

Mr. Lopardo: "Do you know that?"

Mr. Callaway: "I do know; I definitely remember this job, I remember in how big a hurry they were. That is how I connect it with this; and this panel head was made specifically——"

Mr. Olson: No objection.

Mr. Lopardo: "That was sold to Woodworkers Supply Company?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "That is right."

Mr. Lopardo: "In the Champion panel raiser head which was sold to Woodworkers Supply Company, were there any defects in it?" [324]

Mr. Callaway: "No, there was not."

Mr. Lopardo: "You checked that yourself, personally?"

Mr. Callaway: "That is right."

Mr. Lopardo: "And after the completion of each operation, you checked that personally?"

Mr. Olson: "Just a minute. I object to that, as being leading and suggestive."

The Court: Overruled.

Mr. Lopardo: "As to the Champion panel raiser head which was sold to Woodworkers Supply Company, did you perform each of the operations to which you have testified, on that particular head?"

Mr. Olson: "Do you mean did he personally do that?"

Mr. Lopardo: "That's right, as to what he has testified he usually does."

Mr. Callaway: "I personally do that?"

Mr. Lopardo: "That's right; everything you have testified to that you do?"

Mr. Callaway: "I gave it to the engine lathe operator, he performed the operation, yes, if that is what you mean."

Mr. Lopardo: "The men whom you have named——"

Mr. Callaway: "Yes."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "——they performed the operations on that Champion panel raiser head?"

Mr. Callaway: "That is right." [325]

Mr. Lopardo: "And that Champion panel raiser head, each inspection that you have testified to was made, of that head?"

Mr. Callaway: "That is right; that is correct."

Mr. Lopardo: "And when that Champion panel raiser head left your hands, was it in good condition?"

Mr. Callaway: "It was."

Mr. Lopardo: "Had you at any time had any steel castings from Gunité Foundries which had been defective?"

Mr. Callaway: "No, we have not."

Mr. Olson: "I object to that, on the ground that it is irrelevant and immaterial, tends to prove no issue in this case. I move the answer be stricken."

The Court: The motion will be granted.

Mr. Lopardo: "If there were a bubble in the casting, would that break under the normal use to which these panel raiser heads are put?"

Mr. Olson: "I object to that question, as being so vaguely and ambiguously phrased that it is impossible of an intelligent answer; and furthermore, as invading the province of the jury; and——"

The Court: Overruled.

Mr. Callaway: He reframed it, your Honor.

Mr. Olson: I didn't read the next page. I am sorry.

(Deposition of Charles E. Meissner.)

The Court: All right. [326]

Mr. Callaway: Page 101, starting with "Have you——"

Mr. Lopardo: "Have you performed any tests on these castings which are used on these panel raiser heads?"

Mr. Olson: "What particular castings are you talking about? Or I will object to that."

Mr. Lopardo: "Well, the castings of the same lot from which the Champion panel raiser head was made which was sold to Woodworkers Supply Company."

Mr. Callaway: "Made any tests on any castings?"

Mr. Lopardo: "In other words, have you bored any holes in any of them?"

Mr. Callaway: "Yes, we have."

Mr. Olson: "I object to this, as being irrelevant and immaterial."

The Court: Overruled.

Mr. Lopardo: "And what were the results?"

The Court: They are talking now not about a general operation, but a special operation out of the same metal. Therefore, that is germane to the inquiry here.

Mr. Callaway: "I bored a hole in one of these——"

Mr. Lopardo: "Will you indicate on part 2 of Defendant's Exhibit 1?"

Mr. Callaway: "I bored a hole in here, through this part 2. (Indicating.)"

(Deposition of Charles E. Meissner.)

Mr. Olson: "Indicating the upper cutter, right?" [327]

Mr. Callaway: "That is right."

Mr. Lopardo: "Will you indicate upon the identification mark there the approximate position?"

Mr. Callaway: "I bored a hole in here (indicating) about .200 diameter."

Mr. Lopardo: "Will you mark a circle there?"

Mr. Callaway: "In fact, I bored three different holes."

Mr. Lopardo: "Mark a circle there."

Mr. Callaway: "Right here. (Indicating.)"

Mr. Lopardo: "That is on the identification tag of part 2 of Defendant's Exhibit 1?"

Mr. Callaway: "That is correct."

Mr. Olson: "This is all objected to, as being irrelevant and immaterial."

The Court: Overruled.

Mr. Callaway: "Also, I bored two more holes, one in each of these other arms, directly through here (indicating), the same size diameter."

Mr. Lopardo: "Indicating flush with——"

Mr. Callaway: "With that raise at the bottom."

Mr. Lopardo: "All right."

Mr. Olson: "That is objected to, as being irrelevant and immaterial."

The Court: Overruled. [328]

Mr. Lopardo: "What were the results?"

Mr. Callaway: "I took the same casting, I put

(Deposition of Charles E. Meissner.)

it in a large vise and I hammered on that with a six-pound hammer, using both hands; I could not break that off. I also had another man try it, and he couldn't do it."

Mr. Olson: "That is all objected to, as being irrelevant and immaterial, tending to prove no issue in this case; and the alleged tests which are purported to have been made are not analogous to the claimed defects in the casting in issue here. For all those reasons, I move that the questions and answers be stricken."

The Court: The motion will be denied.

Mr. Lopardo: "And the tests were made upon a casting which came from the same lot?"

Mr. Callaway: "From the same lot; yes, sir."

Mr. Lopardo: "As the Champion panel raiser head which was sold to Woodworkers Supply Company?"

Mr. Callaway: "That is right."

Mr. Lopardo: "And which was the one which is involved in this law suit?"

Mr. Callaway: "Yes, sir."

Mr. Lopardo: "Assuming for the purpose of this question that there was an air bubble in one of the arms of part 2, which did not extend to the surface; would a Champion panel head, if put to normal usage—would it break?" [329]

Mr. Callaway: "That would never break if put to normal use. You are taking such a light cut of this wood. I have taken heavier cuts with fly

(Deposition of Charles E. Meissner.)

cutters, in a milling machine, with a cutter head smaller than that, and it never broke. And here you are just taking a light cut of wood.”

Mr. Olson: “Object to the question and answer; that called for the speculation and conclusion of the witness; on the further ground that the conditions calling for the answer are not sufficiently described so that any intelligent conclusion can be arrived at therefrom; and on the further ground that there is no similarity between the conditions assumed in the question and the conditions existing in the particular head in question at the time it broke or disintegrated. For all those reasons, I move the question and answer be stricken.”

The Court: The motion will be denied.

Mr. Lopardo: “What would cause one of the arms to break?”

Mr. Olson: “I object to that, unless there are some further facts included in the question.”

Mr. Lopardo: “What would be required to cause one of those arms to break?”

Mr. Callaway: “What would cause it to break in operation? If that was not properly set up right, if these two set screws were not fastened right; if the nut on the spindle [330] was not tight enough.”

Mr. Lopardo: “The Champion panel raiser head which was sold to Woodworkers Supply Company, if one of the arms on that broke, would that break in normal usage?”

(Deposition of Charles E. Meissner.)

Mr. Callaway: "That would not break in normal usage, taking a light cut out of wood, like it was supposed to."

Mr. Lopardo: "And if it broke, what would cause it to break?"

Mr. Olson: "I move that the question and answer be stricken, on the ground that it calls for the pure conclusion of the witness; and there are too few facts assumed in the question to enable the witness to base an intelligent judgment; in other words, the answer is nothing but the speculation and conclusion of the witness; and I therefore move it be stricken."

The Court: I think that last question——

Mr. Callaway: He reframed it.

Mr. Olson: I am sorry.

Mr. Lopardo: "All right; we will amend the question: And if it broke, what could cause it to break?"

Mr. Olson: "That is still subject to my objection; I object, that there are not sufficient elements included in this question so it can be answered intelligently."

The Court: I think that question is too speculative. I will sustain the objection to that question. [331]

Mr. Callaway: "It might have been misused, improperly."

Mr. Olson: That is the same answer to the same question.

(Deposition of Charles E. Meissner.)

Mr. Callaway: There is no objection made in the record.

Mr. Olson: I just made one.

Mr. Lopardo: That was to the previous part of it.

Mr. Olson: You haven't read anything else. Mr. Hubbard said, "You have made your objection three times. May we have an answer to the question?" You can't give that answer. He says, "What else?"

The Court: I will sustain the objection to the question.

Mr. Olson: You can't say, "What else?" to an answer he can't give.

I think the next question should start, "Then, in the Champion panel raiser head which was sold to Woodworkers Supply Company——"

Mr. Lopardo: "Then, in the Champion panel raiser head which was sold to Woodworkers Supply Company, which is involved herein, if that had been subjected to normal use your answer is there would be no breakage?"

Mr. Callaway: "There could not be."

Mr. Olson: The same objection, leading and suggestive; very leading.

The Court: I will sustain that objection. The other calls for experimental testimony; this does not.

Mr. Lopardo: "Do you have an opinion as to the Champion [332] panel head which was sold to

(Deposition of Charles E. Meissner.)

Woodworkers Supply Comany, and which is involved herein, knowing about the claim which is being made here that it broke?"

Mr. Callaway: "Well, I think head went through some severe punishment, in order to force this all the way back to here. (Indicating.)"

Mr. Olson: "I object to the question, and move the answer be stricken on the ground that the question calls for and the witness has given pure speculation and conclusion in the answer. He has not sufficient facts to express an intelligent opinion, and he does not attempt to express an intelligent opinion, but a mere conclusion."

The Court: Yes. I think that question is improper. The objection will be sustained.

Mr. Lopardo: "The normal position of the panel raiser head is how?"

Mr. Callaway: "The way it is setting there is the normal position. (Indicating.)"

Mr. Lopardo: "You will have to describe that for us."

Mr. Callaway: "These knives on part 2 are in between the knives on part 1."

Mr. Lopardo: "If they are directly opposite each other, is that a normal position?"

Mr. Callaway: "That is not a normal position; they will hit when located that way." [333]

Mr. Lopardo: "And can it be operated at any time where they are directly opposite each other?"

Mr. Callaway: "It could not be operated that way."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "And if they were directly opposite each other, what would that indicate to you?"

Mr. Olson: "I object to that, as being a pure conclusion of the witness; there is no claim they were ever opposite each other, and there is no evidence before us that they were——"

The Court: I will sustain the objection to the last question.

Mr. Lopardo: "If the two were directly opposite each other, what would happen to the pin in the slot?"

Mr. Olson: Same objection.

The Court: The objection is sustained.

Mr. Lopardo: "Could the panel raiser head operate?"

Mr. Callaway: "That panel raiser head could not operate that way."

Mr. Lopardo: "That is, where they are directly opposite each other?"

Mr. Callaway: "Yes."

Mr. Lopardo: "Is there additional reason why they could not operate?"

Mr. Olson: I say these questions lead on to the same question. [334]

The Court: No. The method of operation is different. This last question is objectionable. I will sustain the objection to that.

Mr. Lopardo: There is none in the record.

Mr. Olson: There was none in the record. I say the objection I made, which was sustained, goes to all the following questions.

(Deposition of Charles E. Meissner.)

The Court: No. I will allow that to go in. The reason I sustained the other objection was it was merely a completed answer to a question as to which objection had been sustained. There is no objection to that last question. I would not allow it, anyhow.

Mr. Olson: There is an objection on page 109. The same objection to all these questions.

“I make the same objection to all of these questions, since my last objection; and again that these answers be stricken.”

The Court: Then the objection to the last question will be sustained.

Mr. Callaway: Your Honor, it isn't made until after several more questions are answered.

The Court: You see, you gentlemen have taken my copy.

Mr. Callaway: The question is, the one he is objecting to is the first one at the top of the page.

Mr. Olson: It all goes to the fact that there is no [335] evidence the blades were in the position they are talking about at the time.

Mr. Callaway: What about——

The Court: This is a *res ipsa loquitur* case. When the plaintiff relies on that, I believe a greater latitude should be allowed to the defendant in explaining the operation of the machine, in response to the inference drawn from the mere happening of the accident.

What answer are you talking about?

(Deposition of Charles E. Meissner.)

Mr. Callaway: We are talking about the first question and the first answer on the page.

The Court: I will merely sustain objections to particular questions that are made.

Mr. Lopardo: I will repeat the question.

“Is there additional reason why they could not operate?”

Mr. Callaway: “If they were in that position this top head detail, it would not be fastened on part 1.”

Mr. Lopardo: “Would there be any clearance between the knives?”

Mr. Callaway: “There wouldn’t be any clearance.”

Mr. Lopardo: “By that what do you mean?”

Mr. Callaway: “This knife would be directly above here (indicating); there wouldn’t be clearance enough for your panel to be raised in between those two knives.”

Mr. Olson: There is an objection there for the same [336] reason, your Honor, that question and answer—move the answer be stricken. It assumes facts not in evidence.

Mr. Callaway: It is merely telling how the thing operates; why it couldn’t operate.

Mr. Olson: There is no testimony anywhere in the record it was in that condition when it was operating.

The Court: There is not any evidence it was in any condition. The testimony is something hap-

(Deposition of Charles E. Meissner.)

pened. He has a right to testify how this instrument operates.

Mr. Olson: Not improperly.

The Court: He is not doing it improperly.

Mr. Olson: He is assuming that the arms were parallel to each other when it was in operation.

The Court: There is no objection to the particular question.

Mr. Olson: Yes, page 109, in the middle of the page.

The Court: You cannot object to questions that precede——

Mr. Olson: I am only objecting to the last question preceding. The others have been read. No objection was made.

The Court: This is an answer he has made. There is no objection to the question until after the answer has been given. About line 9 there is a question, "By that what do you mean?"

The answer is, "This knife would be directly above here [337] (indicating); there wouldn't be clearance enough for your panel to be raised in between those two knives."

Then Mr. Johnston says, "I make the same objection to all of these questions, since my last objection; and again that these answers be stricken." The motion will be denied.

You cannot save up your objections and then put them back in.

Mr. Olson: I understood your Honor to mean

(Deposition of Charles E. Meissner.)

with the last ruling. I agree with you, that I could only make the objection before——

The Court: Go ahead.

Mr. Lopardo: “And if the panel raiser head with the two knives were exactly opposite each other, in other words, part 2 and part 1, would that cause one of them to break?”

Mr. Callaway: “Yes, it would.”

Mr. Olson: I object on the same ground. There is no objection in the record.

The Court: No. The objection is overruled.

Mr. Olson: There is objection——

The Court: If there is, it is overruled. In answering the prima facie inference, from the mere happening of the accident, they have a right to go into detail to show how this machine operates and what would or what would not happen if it were used in the proper manner.

Mr. Olson: Your Honor, I agree with you. I don't want to take the time of the court. I am not arguing with your [338] ruling. I don't know whether I understand you or not.

My objection, and the objection in this record, is not to the form of the question nor to the answer. It is just to the fact that all these questions are asked as to what would happen to the panel raiser head if it were operated with the arms parallel.

The Court: This is a standard machine. Any man who is concerned with the operation of the

(Deposition of Charles E. Meissner.)

machine has a right to show how it operates in a normal fashion.

Mr. Olson: I agree with you. This is not in normal fashion. They are talking about the arms being parallel. The arms aren't parallel.

The Court: That is a question of argument.

Mr. Olson: There is an abundance of evidence in this record to show that the arms were not in the position they are stating.

The Court: You can argue that to the jury.

Mr. Olson: It is assuming facts not in evidence.

The Court: I know what I am doing. Go ahead.

Mr. Lopardo: "Why?"

Mr. Callaway: "It would automatically throw this top head against the lower one, causing one arm to snap off."

Mr. Olson: I won't object.

Mr. Lopardo: "Henry Danielson, are you familiar with what his experience has been?" [339]

Mr. Callaway: "Yes, I am."

Mr. Olson: "I object to that, as not being the best evidence."

The Court: That is merely a general inquiry as to how long he has worked, as to his experience.

Mr. Lopardo: "What has been his experience?"

Mr. Callaway: "He came to Woodworkers Tool Products well recommended; he worked at Klein Electric before he came to Woodworkers Tool Works. Before that he operated his own machine shop."

(Deposition of Charles E. Meissner.)

Mr. Olson: "I move the answer be stricken."

The Court: The part that he came well recommended may be stricken out. The remainder may remain. It gives his length of experience.

Go down to "He has been employed by Woodworkers Tool Works how long?"

Mr. Lopardo: "He has been employed by Woodworkers Tool Works how long?"

Mr. Callaway: "I would say about two or two and one-half years."

Mr. Lopardo: "During that time you have had occasion——"

Mr. Olson: Go ahead.

Mr. Lopardo: "During that time have you been in a position to observe his work?"

Mr. Callaway: "Yes, I have; his work is of the best." [340]

Mr. Olson: "That is objected to as irrelevant and immaterial."

Mr. Lopardo: All we are trying to show——

Mr. Callaway: Let's don't argue.

The Court: That may be stricken. It is merely a characterization. That may be stricken, and the jury instructed to disregard that.

Mr. Callaway: "Victor Barron is a good milling machine operator."

Mr. Loapardo: "He has been with your company how long?"

Mr. Olson: Excuse me. I am a little slow. The same objection, a conclusion of the witness, that

(Deposition of Charles E. Meissner.)

he is a good millman. That is not the best evidence, what his opinion on him is.

The Court: Is there an objection in the record on that?

Mr. Olson: Yes, there is.

The Court: That may be stricken. The length of time, it all goes to the care taken in making inspections of the material, so length of time of employment is material.

Mr. Lopardo: "He has been with your company how long?"

Mr. Callaway: "About two years."

Mr. Lopardo: "Has he been under your direct supervision?"

Mr. Callaway: "He has been under my direct supervision, yes."

Mr. Olson: I want to make the general objection again, [341] that all this is hearsay, not the best evidence, and irrelevant and immaterial. I move that the answer be stricken.

The Court: The motion will be denied.

Mr. Lopardo: "The men who performed each step in the operation of the manufacture of the Champion panel raiser head are skilled workmen, is that correct?"

Mr. Callaway: "They are."

Mr. Olson: "Object to that, as the conclusion of the witness; I move the answer be stricken."

The Court: That is a conclusion. That may be stricken. He has already told us how long they

(Deposition of Charles E. Meissner.)

were employed and what their experience has been.

Mr. Lopardo: "And you know that of your own knowledge, do you?"

The Court: That would follow.

Mr. Olson: Same objection. Same motion made.

The Court: I will sustain the objection.

Mr. Olson: That is all of direct examination. I am not going to start the first part here.

Mr. Callaway: I don't blame you. I would leave that out, too.

Mr. Olson: Page 113, about the middle of the page.

Cross-Examination

"How many orders for Champion panel raiser heads have you had in the past five years that you have been with Woodworkers Tool Works? [342]

Mr. Callaway: "I have had about one hundred orders."

Mr. Olson: "You wouldn't say it would be 150?"

Mr. Callaway: "No."

Mr. Olson: "Or 50?"

Mr. Callaway: "No."

Mr. Olson: "And do you recall the details of every one of those one hundred orders?"

Mr. Lopardo: I object to that, your Honor. It is not material. It is irrelevant.

The Court: Oh, no. It goes to his recollection. He has testified that he remembered the particular order, because it is a special order. Then they may

(Deposition of Charles E. Meissner.)

ask him if he remembers any others.

Mr. Callaway: "I can't name all the customers, no."

Mr. Olson: "And you cannot recall all the details of each of those orders?"

Mr. Callaway: "I cannot recall all the details of a hundred orders, no."

Mr. Olson: "But you do remember this particular order?"

Mr. Callaway: "I remember this particular one."

Mr. Olson: "Your memory in this particular case was greatly refreshed after you found a law suit had been brought against Woodworkers Tool Works?"

Mr. Lopardo: I object.

Mr. Callaway: Waive the objection. Let's go on. Let's [343] get the answer.

"No, that is not correct. I found those castings came in, I had been waiting for these castings on this specific order, because we had several calls from customers out there."

Mr. Olson: "What is the name of the clerk in the tool room who checked these castings for weight when they came in?"

Mr. Callaway: "George Macek."

Mr. Olson: The bottom of the page, now.

Mr. Callaway: Don't leave this out. I didn't mind your leaving out the first, because I thought it was a lot of folderol your attorney was indulging in. Let's read the rest of this.

(Deposition of Charles E. Meissner.)

Mr. Olson: This is my cross-examination.

The Court: You can offer it later on.

Mr. Olson: I am glad you asked that. I will read it. If you are going to read it, I have no objection to reading it. I did forget something I want to read back there on page 103.

The Court: Do not mark on the original.

Mr. Callaway: Mr. Lopardo will read it.

Mr. Olson: I want to go to page 103.

Mr. Callaway: Let's do one thing at a time.

Mr. Olson: This is more of the sequence. If I do it now, I will have it over with. It is only a few questions, [344] regarding this test that was made. Mr. Johnston asked a question I want to put in evidence. You recall the testimony on the hammering of the piece that didn't break. Line 7, page 103. No; it is line 18 on page 103.

"What was the date of these tests?"

Mr. Callaway: "I tried that out this morning."

Mr. Olson: "Is that when you made the tests?"

Mr. Callaway: "Yes, I tried it out this morning."

Mr. Olson: That is what I wanted. Now, page 114.

"And you cannot recall all the details of each of those orders?"

Mr. Callaway: No, no.

Mr. Olson: I am sorry.

Mr. Callaway: It is after the answer about George Macek.

Mr. Olson: "You are sure he was there and

(Deposition of Charles E. Meissner.)

working for the company?"

Mr. Callaway: "Yes, I am."

Mr. Olson: "That was in October, 1948, I believe?"

Mr. Callaway: "Chaps who have been in our employ about 12 years."

Mr. Olson: "What was the name of the engine lathe man you testified you gave the castings to?"

Mr. Callaway: "Henry Danielson."

Mr. Olson: "Do you remember the names of all the other men that performed the various operations?" [345]

Mr. Callaway: "I do."

Mr. Olson: "Every one of them?"

Mr. Callaway: "I do know all the names."

Mr. Olson: "You have a very clear picture in your mind as you sit there, of each of the things you did?"

Mr. Callaway: "Yes, I do; I have a clear picture."

Mr. Olson: "You saw each and every one of them?"

Mr. Callaway: "That is right."

Mr. Olson: "During all of these various operations you have described?"

Mr. Callaway: "Yes."

Mr. Olson: "Is that right?"

Mr. Callaway: "That is right."

Mr. Olson: "Is that your custom in making up orders for various tools that are received by your company?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Yes."

Mr. Olson: "Is that right?"

Mr. Callaway: "That is right."

Mr. Olson: "You stand and watch every operation, is that right?"

Mr. Callaway: "I give this engine lathe operator this head——"

Mr. Olson: "No, answer my question: Do you stand and watch every operation?"

Mr. Callaway: "That would be an impossibility; I have [346] about twenty men."

Mr. Olson: "In this particular case, however, you stood and watched every operation from the beginning to end; and you have a very clear memory of it, is that right?"

Mr. Callaway: "I did not stand and watch every operation from beginning to end, no."

Mr. Olson: "Then you want to change the testimony you gave a few moments ago, to the effect that you did see every operation from beginning to end?"

Mr. Callaway: "I remember giving this casting to Henry Danielson——"

Mr. Olson: "No, answer my question."

Mr. Lopardo: "I submit, he has answered."

Mr. Olson: "Read the question."

Mr. Callaway: "I did not see every operation from beginning to end."

Mr. Olson: "You did not?"

Mr. Callaway: "Not every operation, no."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Then you want to change the form of your testimony?"

Mr. Callaway: I submit this is arguing with the witness.

Mr. Olson: There is no objection in the record.

Mr. Lopardo: "Are you restricting that to the particular Champion panel raiser head which was sold to the Woodworkers Supply Company?" [347]

Mr. Olson: "That is right."

"All right."

"You want to change that answer now?"

Mr. Callaway: "When I referred to that I was referring——"

Mr. Olson: Where are we reading?

Mr. Callaway: You are just reading a lot of stuff between attorneys.

Mr. Olson: There is no objection in the record. I want this in the record.

"You want to change that answer now?"

Mr. Lopardo: "Did you understand the question applied to the specific head which was sold to the Woodworkers Supply Company?"

Mr. Olson: "That is the only one he described the operations on."

"You want to change that?"

Mr. Callaway: "When I referred to that I was referring to engine lathe; now then you asked me the next operator—I remember the engine lathe operator machining this casting."

Mr. Olson: "You now say you did not see every

(Deposition of Charles E. Meissner.)

single operation from beginning to end, on this particular head?"

Mr. Callaway: "Are you talking about all the operations, or the operation on the lathe?"

Mr. Olson: "The question speaks for itself: Do you now [348] want to change that testimony?"

Mr. Lopardo: I object to that, your Honor, on the ground he is arguing with the witness.

The Court: I will sustain the objection.

Mr. Olson: He won't give an answer.

The Court: He is trying to get the witness to admit his testimony now is different from what he had given. Having attempted three or four times, and not succeeding, I will sustain the objection to that inquiry.

Mr. Olson: "And you remember every operation that was performed on it, do you?"

Mr. Callaway: "All the heads are the same."

Mr. Olson: I didn't see the objection on the other page, I am sorry.

"Oh, so you are not depending on a particular recollection of these particular operations on the Champion panel raiser head that is in issue here; you are depending on your memory of operations of this kind or type, on this kind or type of panel raiser head; isn't that right?"

Mr. Lopardo: "I object."

Mr. Callaway: The objection will be waived.

"I am referring to this specific head here."

Mr. Olson: "You remember all of those operations?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "I am speaking about——"

Mr. Olson: I didn't have a question. You just went on. [349]

There was an objection you waived and then the question was read.

Mr. Callaway: "I am speaking about this particular head."

Mr. Olson: "You remember all of those operations?"

Mr. Callaway: "I remember those operations."

Mr. Olson: "And it is not because they are the same general type of operations that you saw many other times on my other heads, is that right?"

Mr. Lopardo: I object to that on the ground he is arguing with the witness again, your Honor.

The Court: It is all right.

Mr. Callaway: "I remember this engine lathe operator turning this head; then it was given to the milling machine operator."

Mr. Olson: "You are not answering the question;—will you read the question?"

The question is read.

"Now, answer that question, please: Is it the many operations you are remembering,—just yes or no?"

Mr. Callaway: "That question is not clear; I remember this distinct operation on the lathe."

Mr. Olson: "That one single operation?"

Mr. Callaway: "That one single operation on this lathe."

(Deposition of Charles E. Meissner.)

Mr. Olson: "But you don't remember all the different [350] operations, all the way through, on this particular head, do you?"

Mr. Callaway: "Well, I gave it to the milling machine operator——"

Mr. Olson: "Do you remember all those operations, or don't you; yes or no, all those operations? Right now, as you sit here, you don't remember those operations, all of them, do you?"

Mr. Callaway: "Not every one, no; not on this particular head, except on the turning of the lathe."

Mr. Olson: "Just that one operation?"

Mr. Callaway: "That is right."

Mr. Olson: "Then, some six or seven or nine that you described,—I think it was about nine, wasn't it?"

Mr. Callaway: "About seven, I would say."

Mr. Olson: "So you remember one distinctly?"

Mr. Callaway: "I remember the turning on the lathe distinctly."

Mr. Olson: "The rest of them, you remember just the general operation that was performed on all heads of that kind, right?"

Mr. Callaway: "Right."

Mr. Olson: Page 121.

"How long did all of these various operations take, from the beginning to the end of the manufacture or the fabrication [351] or processing, or whatever you would call it, by your company, of this particular Champion panel raiser head?"

Mr. Callaway: "Are you talking about one or a group now?"

(Deposition of Charles E. Meissner.)

Mr. Olson: "The entire, all of the operations from beginning to end, on one head? Do you call these two separate heads? They are all one?"

Mr. Callaway: "We might run more than one."

Mr. Olson: "Is this one head? (Indicating.)"

Mr. Callaway: "That is one head; but we might make more than one."

Mr. Olson: "Does it take an hour, two hours, or two days?"

Mr. Callaway: "Say about five hours, or more."

Mr. Olson: "Five hours or more?"

Mr. Callaway: "Yes."

Mr. Olson: "If you spent the entire five hours or more that it takes to perform the nine operations you mentioned on this head, you would not do anything else on that day, would you; isn't that true? Answer that yes or no; there wouldn't be time for you to do anything else, would there?"

Mr. Callaway: "Yes."

Mr. Olson: "What else would you be able to do?"

Mr. Callaway: "I could supervise the setting up on this."

Mr. Olson: "Just glance at it every ten, fifteen minutes?" [352]

Mr. Callaway: "No, I would see that it is set up properly."

Mr. Olson: "Just glance at it once in a while?"

Mr. Callaway: "I could check it."

Mr. Olson: "Then, you didn't watch it in this particular case all the way through?"

(Deposition of Charles E. Meissner.)

I won't get into that.

Mr. Callaway: I don't think that question was ever answered.

Mr. Olson: Let's start on page 123, at the bottom, about three-quarters of the way down. It was answered.

Mr. Callaway: "Yes, they are checked after each operation."

Mr. Olson: Where are you reading?

Mr. Callaway: At the bottom of page 123.

Mr. Olson: I don't see where you are reading, Mr. Callaway.

Mr. Callaway: The bottom of page 123.

Mr. Olson: I am going before that. Just above that.

"Aside from the tests you performed this morning on a casting which you say is similar to the one from which you say this head was made, you never tested any castings out of that batch, did you?"

Mr. Callaway: "Yes, they are checked after each operation." [353]

Mr. Olson: "Tests made; what tests are made?"

Mr. Callaway: "Checked and inspected."

Mr. Olson: "I didn't ask anything about checking and inspecting; I asked you if any other tests were made."

Mr. Callaway: "No; it is not necessary in a casting like this."

Mr. Olson: "I didn't ask that, and I move the

(Deposition of Charles E. Meissner.)

answer be stricken, as not responsive. Did you make any tests?"

Mr. Callaway: It was asked again.

Mr. Olson: "Did you make any tests of any kind?"

Mr. Callaway: "It was not necessary; no."

Mr. Olson: "All right, the answer is no, is that right; is that correct?"

"Up until this morning you made no tests on any of these castings, is that correct?"

"That check was this morning, wasn't it?"

Mr. Callaway: "Yes, that check was this morning."

Mr. Olson: "And that was the first check you made, you; was that the first test you made?"

Mr. Callaway: "I made, yes."

Mr. Olson: "Did anybody make any tests, up until that time, for your company, either by X-ray, radiogram, magnaflux, or anything of that sort, do you know?"

Mr. Callaway: "Yes, we had them X-rayed."

Mr. Olson: "When?" [354]

Mr. Callaway: "I don't know when these X-rays were made."

Mr. Olson: "Did they find any air bubbles in them?"

Mr. Callaway: "Not one."

Mr. Olson: "Any other defects?"

Mr. Callaway: "No."

Mr. Olson: "When were these tests made?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "I don't know when."

Mr. Olson: "Who made them?"

Mr. Callaway: "I would have to look up the records to find that out."

Mr. Olson: "Were they made within the last month?"

Mr. Callaway: "Oh, they were made previous."

Mr. Olson: "Approximately what date?"

Mr. Callaway: "I couldn't say."

Mr. Olson: "Do you have a report on those tests, your company, I mean?"

Mr. Callaway: "They may have."

Mr. Olson: "You saw the report, did you?"

Mr. Callaway: "No, I didn't see that."

Mr. Olson: "You didn't see the report?"

Mr. Callaway: "No."

Mr. Olson: "And what is your job, production superintendent?"

Mr. Callaway: "Plant superintendent." [354]

Mr. Olson: "And you never saw the report?"

Mr. Callaway: "No, I didn't see the report."

Mr. Olson: "You know that the test was made?"

Mr. Callaway: "They were made."

Mr. Olson: "And you know that a report was made, and you didn't see it?"

Mr. Callaway: "That is right."

Mr. Olson: "You didn't concern yourself with it?"

Mr. Callaway: "Well, they were just pronounced o.k."

(Deposition of Charles E. Meissner.)

Mr. Olson: "So you took it for granted that whoever told you had read the report correctly?"

Mr. Callaway: "That is right."

Mr. Olson: "You don't know whether it was correct, or not; or whether he read it correctly?"

Mr. Callaway: "Well, that is what they are paid for."

Mr. Olson: "If I understand correctly, when you get these castings from the Gunitite Foundries, in Rockford, Illinois, you just take it for granted that they are all right, unless something turns up in your inspection to show otherwise; is that right?"

Mr. Callaway: "Yes; they are a reputable manufacturer."

Mr. Olson: "You do not X-ray each individual batch of castings, do you, or magnaflux them?"

Mr. Callaway: "Not magnaflux."

Mr. Olson: "Do you X-ray each batch of castings, as they [356] come in?"

Mr. Callaway: "No, not each batch."

Mr. Olson: "But you do X-ray some batches?"

Mr. Callaway: "Some of them were X-rayed, yes."

Mr. Olson: "But not until after this claim about defect occurred?"

Mr. Callaway: "I don't know when it occurred."

Mr. Olson: "Well, it occurred on the 28th day of October, 1948."

Mr. Callaway: "That I couldn't say."

Mr. Olson: "And the X-ray tests you are talk-

(Deposition of Charles E. Meissner.)

ing about were made in the last month or two, weren't they?"

Mr. Callaway: "No, they were not; they were made previous to that."

Mr. Olson: "How far previous?"

Mr. Callaway: "I don't know how far back."

Mr. Olson: "Six months ago?"

Mr. Callaway: "I couldn't say how far back."

Mr. Olson: "Didn't you know when they were made?"

Mr. Callaway: "No, I don't know when they were made."

Mr. Olson: "Did you know at the time they were made, whenever that was?"

Mr. Callaway: "I know about the time, yes."

Mr. Olson: "Now, you know about those details on those nine operations on these particular castings, but you don't [357] know when the tests were made, whether the tests were made after the defect developed?"

Mr. Callaway: "This is my job, to know about all these operations; I assign these jobs out."

Mr. Olson: "When you fall down on your job, you are interested in tests to see if you are doing the job correctly?"

Mr. Callaway: "Yes, I am interested in that."

Mr. Olson: "But you don't know when the test was made?"

Mr. Callaway: "I don't know when the test was made."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Actually, you don't know when the tests were made?"

Mr. Callaway: "I don't know."

Mr. Olson: "But your memory is pretty good, I might say marvelous."

Mr. Callaway: "I just happen to remember that one incident, this customer was waiting for those castings, he had a couple of letters in there on it."

Mr. Olson: "Now let me ask you this: You understand the meaning of the word 'void' in a casting?"

Mr. Callaway: "Void, meaning not any good?"

Mr. Olson: "No, meaning a crack or a fissure."

Mr. Callaway: "I know a crack; fissure I never heard."

Mr. Olson: "Did you ever hear of a void in a casting?"

Mr. Callaway: "I never heard that." [358]

Mr. Olson: "You know what an air bubble or a gas bubble is?"

Mr. Callaway: "Yes, I do."

Mr. Olson: "And that is the same thing, I believe, as a gas pocket, or void is the same—well, you don't know the meaning of the word void?"

Mr. Callaway: "If it is the same as gas pocket——"

Mr. Olson: "A gas pocket, however, is simply a little aperture in the material?"

Mr. Callaway: The lawyer is doing all the testifying there.

(Deposition of Charles E. Meissner.)

Mr. Olson: Let's not have any comment. I could read some other comments from the lawyers. Will you read from page 130, Mr. Callaway, at the eleventh line?

Mr. Callaway: "What are you asking me?"

Mr. Olson: "It is a little crack or a fissure, isn't that correct,—a little space where the material is not solid?"

Mr. Callaway: "That would be right, yes; an air bubble, a little pocket."

Mr. Olson: "You didn't make any tests on these castings from which the casting that was used in the head in question came, for phosphorus or sulphur contents, did you,—or the company?"

Mr. Callaway: "None to my knowledge, no."

Mr. Olson: "If they had been made you would have known that, with your good memory and your knowledge of all these steps?"

Mr. Callaway: "Yes, I would."

Mr. Olson: "If it developed that the phosphorus content in the panel raiser head in question was as high as .072 per cent, whereas in the other arm it was .039 per cent, would that indicate anything to you?"

Mr. Callaway: "That would not; I am not a metallurgist."

Mr. Olson: "And would you know when the phosphorus percentage or content was high and when it was low?"

Mr. Callaway: "I would not."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Or the sulphur content?"

Mr. Callaway: "No."

Mr. Olson: "And if the sulphur and phosphorus content, or either one of them, or silicon content, were high, you do know that would make the casting brittle?"

Mr. Callaway: "No, I wouldn't know; I am not a metallurgist."

Mr. Olson: "And you made no tests for sulphur, phosphorus or silicon content of those castings?"

Mr. Callaway: "No; I said no."

Mr. Olson: "Do you know what inclusion in a casting is, or porosity?"

Mr. Callaway: "Porosity, are you talking about density [360] now, when you say porosity?"

Mr. Olson: "Well, I don't know, to be honest with you."

Mr. Callaway: "I wouldn't know, no."

Mr. Olson: "Now, blow-holes, gas-holes, and air-holes all have the same effect on the metal; is that correct?"

Mr. Callaway: "They would."

Mr. Olson: "They are all substantially the same?"

Mr. Callaway: "Yes, they are all the same."

Mr. Olson: "Now, if you found blow-holes in any of these castings, did you use the casting, or discard it?"

Mr. Callaway: "That was immediately discarded."

(Deposition of Charles E. Meissner.)

Mr. Olson: "And there were some of them in this particular batch which were discarded because of blow-holes; is that correct?"

Mr. Callaway: "There was none."

Mr. Olson: "None of them?"

Mr. Callaway: "No."

Mr. Olson: "Blow-holes are structural defects in steel of this type, are they not?"

Mr. Callaway: "A blow-hole is a structural defect in any steel."

Mr. Olson: "And a blow-hole in steel of this type, if large enough, will be a very dangerous condition; is that not true?" [361]

Mr. Callaway: "No, I wouldn't say it would be a dangerous condition."

Mr. Olson: "No matter how large they are?"

Mr. Callaway: "No matter how large they are."

Mr. Olson: "Or how small?"

Mr. Callaway: "Or how small."

Mr. Olson: "Or how many there are, or how few there are?"

Mr. Callaway: "No."

Mr. Olson: "They are still not a dangerous condition?"

Mr. Callaway: "They are still not dangerous; does he say——"

Mr. Olson: "And they don't constitute a dangerous or structural defect in the steel?"

Mr. Callaway: "No."

Mr. Olson: "You are sure of that?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Not in this particular instance."

Mr. Olson: "Now, wouldn't the blow-holes, if they were either large or if there were a number of them,—wouldn't they reduce the strength of the steel?"

Mr. Callaway: "It would weaken it, but it would not weaken it to the point where it would be dangerous."

Mr. Olson: "That is your answer?"

Mr. Callaway: "That is my answer."

Mr. Olson: "You are sure of that?"

Mr. Callaway: "I am sure of that." [362]

Mr. Olson: "Under no circumstances could a blow-hole weaken the steel to the point where it would constitute a dangerous structural defect?"

Mr. Lopardo: I will have to object to that unless he restricts it to the same casting in issue here.

Mr. Olson: This is cross-examination.

The Court: Go ahead. He may answer.

Mr. Olson: "Will you answer the question, please?"

Mr. Callaway: "I have never seen one in a panel raiser head."

Mr. Olson: Page 137.

Mr. Callaway: No.

Mr. Olson: Oh, yes. Page 136, line 20.

"You have seen blow-holes in the steel, in other metals?"

Mr. Callaway: "I have seen it in cast iron, not cast steel."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Never seen it in steel?"

Mr. Callaway: "Never seen it in steel."

Mr. Olson: "Under no circumstances could a blow-hole weaken a steel casting to the point where it would constitute a dangerous structural defect?"

Mr. Callaway: "No, it could not; not the way that was manufactured; it would be impossible."

Mr. Olson: "Cast steel?"

Mr. Callaway: "That is right." [363]

Mr. Olson: "In making that answer you are depending on your knowledge of the Gunité Foundries, and the type of steel foundry, and on the castings they furnished; is that right?"

Mr. Callaway: "That is right."

Mr. Olson: "Rather than on your own knowledge?"

Mr. Callaway: "I am depending on them, as well as my own knowledge; because I know them to be a good manufacturer of these steel castings, good clean castings."

Mr. Olson: "And you know of your own knowledge that blow-holes could not constitute a structural dangerous condition on steel castings of this type?"

Mr. Callaway: "That is right; they could not."

Mr. Olson: "Now, blow-holes can be ascertained by magnafluxing or taking X-rays; is that correct?"

Mr. Callaway: "A magnaflux is a test for crack."

Mr. Olson: "Would it not also show up blow-holes, if they were to the surface?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "If they were to the surface, yes."

Mr. Olson: "And X-rays would show up blow-holes and cracks, both, would it not?"

Mr. Callaway: "That is right. I am just basing my knowledge on what I know of X-raying steel."

Mr. Lopardo: "You don't have any experience with that?"

Mr. Callaway: "No, I don't." [364]

Mr. Olson: "But you never used, in connection with your company here, the defendant, either of those tests, magnaflux or X-ray?"

Mr. Callaway: "Not magnaflux; we discussed X-rays more already."

Mr. Olson: "Did you ever use X-rays?"

Mr. Callaway: "I don't know how to use an X-ray machine."

Mr. Olson: "Did your company, as a matter of practice, during the time you got these castings in and had them in your storage bin, ever have them X-rayed, aside from this one time trying to determine whatever you mentioned here a while ago, the date of which——"

Mr. Callaway: "I don't know the date."

Mr. Olson: "Was the particular casting from which this particular panel raiser head in question was manufactured, was that casting ever X-rayed, to your knowledge, by anybody in connection with your company, or for your company; yes or no?"

Mr. Callaway: "This particular one?"

(Deposition of Charles E. Meissner.)

Mr. Olson: "Yes."

Mr. Callaway: "No, it was not X-rayed."

Mr. Olson: "Was it tested in any other way for blow-holes, or anything else of that kind?"

Mr. Callaway: "It was inspected and checked for blow-holes during the operations." [365]

Mr. Olson: "Was any test made with magnesium—was any test made for magnesium, phosphorus or sulphur content in that particular casting?"

Mr. Lopardo: That is objected to on the ground that question has been asked already.

Mr. Olson: I think it has.

The Court: All right.

Mr. Olson: "You have no knowledge of the tests that were made at the foundry at all, do you?"

Mr. Callaway: "No."

Mr. Olson: "Well, were any tests made by or for your company which would determine what the composition of the casting in question was, prior to the time you made it up?"

Mr. Lopardo: I object to that on the ground it has already been answered.

Mr. Olson: That one hasn't.

Mr. Lopardo: I would like to object on the further ground, your Honor—

Mr. Callaway: It has already been sustained and withdrawn.

Mr. Olson: That is a different question, Mr. Callaway.

Mr. Callaway: I don't know where you are.

(Deposition of Charles E. Meissner.)

Mr. Olson: The question I withdrew is not the question I just asked.

Mr. Callaway: Where are you?

Mr. Olson: I am on page 140 at the bottom.

“Well, were any tests made by or for your company which would determine what the composition of the casting in question was, prior to the time you made it up?”

Mr. Callaway: “When I placed this order I order cast steel.”

Mr. Olson: “Yes; did your company make any test of the composition of that casting, after you got it,—the composition of the casting?”

Mr. Callaway: “After we got it?”

Mr. Olson: “After you got it?”

Mr. Callaway: “No.”

Mr. Olson: “At any time before the head was delivered, were any tests made of the composition of the casting?”

Mr. Callaway: “Not to my knowledge.”

Mr. Olson: “If there had been any such tests, you would have known about them, would you?”

Mr. Callaway: “Yes, I would say so.”

Mr. Olson: “It was not the standard practice, though, to make any tests?”

Mr. Callaway: “No. I might add, it was not necessary, out of cast steel.”

Mr. Olson: “Was an open hearth or electric furnace used in casting the steel; do you know which one was used?”

(Deposition of Charles E. Meissner.)

Mr. Callaway: "That I cannot say, how that metal was prepared." [367]

Mr. Olson: "Don't you know that the electric furnace method is far superior?"

Mr. Callaway: "I am no foundry man, as well as metallurgist."

Mr. Olson: "Then your answer is, you don't know, all right."

Then the question: "What was the method of casting employed; were steel molds or centrifugal casts used?"

Mr. Callaway: "I cannot say what their methods of casting it are."

Mr. Olson: "You don't know if centrifugal casts were used the segregation in the metal would be less; you don't know that?"

Mr. Callaway: "I could not say."

Mr. Olson: "What would be the effect of having nearly twice the amount of phosphorus in one arm of the panel raiser head as against another arm; I am talking about the particular panel raiser head you manufactured?"

Mr. Callaway: "I couldn't say whether it would make any difference, being out of cast steel."

Mr. Olson: "No difference, whether the phosphorus content in one arm is twice that in the other?"

Mr. Callaway: "As far as operation is concerned, no; on the operation, none."

Mr. Olson: "If the phosphorus were double in one arm [368] than in the other?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "It would not have any bearing."

Mr. Olson: "Wouldn't it make the steel more brittle, with either of those elements increased?"

Mr. Callaway: "That head is designed for ordinary usage; if it were for extraordinary use, or abuse, it might not stand up."

Mr. Olson: "Then, an extraordinary amount of either sulphur or phosphorus would constitute a defect in iron or steel?"

Mr. Callaway: "I don't think so."

Mr. Olson: "Is your answer no?"

Mr. Callaway: "My answer is no, using it as it is supposed to be used."

Mr. Olson: "What method of heat treatment was used in respect to this particular casting, was the casting quenched in water, or in oil, or was it allowed to cool in the air?"

Mr. Lopardo: "How would he know that?"

Mr. Olson: "I don't know."

Mr. Callaway: "That question would not apply to this head; there is no heat treatment on the head."

Mr. Olson: "On the casting?"

Mr. Callaway: "I don't know about the casting."

Mr. Olson: "You don't know which method was used?"

Mr. Callaway: "I couldn't say; I don't know."

Mr. Lopardo: "He doesn't know whether either method was used."

(Deposition of Charles E. Meissner.)

Mr. Callaway: "I am no foundry man."

Mr. Olson: "What is the effect of the addition of silicon to steel, do you know?"

Mr. Callaway: "I don't know."

Mr. Olson: "Doesn't it tend to make steel brittle?"

Mr. Callaway: "I don't know."

Mr. Olson: "And if too much silicon or phosphorus or sulphur is added, won't it make the steel brittle to the point where it will snap and break very easily?"

Mr. Callaway: "No, I don't say it would break or snap in ordinary usage."

Mr. Olson: "But the question is, wouldn't the addition of any of those three elements make the steel brittle, so that it would snap more easily than it should?"

Mr. Callaway: "No, not in this particular head, using it as it is supposed to be used."

Mr. Olson: "But it would decrease the strength of steel, wouldn't it, if any of those were used in excess?"

Mr. Callaway: "Not where it would make any difference in this head."

Mr. Olson: "It wouldn't make any difference, no matter how much sulphur or phosphorus or silicon was added?"

"Would the addition of any one in excess make any difference?" [370]

Mr. Callaway: "They can go to one extreme or another; but the normal amount in this casting, it

(Deposition of Charles E. Meissner.)

would not make any difference, a few points one way or the other, in this head."

Mr. Olson: "But suppose it were found to be double?"

Mr. Callaway: "That wouldn't make any difference."

Mr. Olson: "Now, let me make this clear, so I am sure you don't misunderstand me: If it were double the normal content, for any one of the three elements, sulphur, phosphorus or magnesium, that wouldn't make any difference?"

Mr. Callaway: "That wouldn't make any difference in this particular head, using it as it was supposed to be used."

Mr. Olson: "But it would tend to make the head more brittle?"

Mr. Callaway: "Not to the point where it would make any difference."

Mr. Olson: "But still, it would tend to make the head more brittle?"

Mr. Callaway: "Not where it would make any difference."

The Court: He is asking the same question and he gets the same answer. They have educated each other.

Mr. Olson: This is page 146, your Honor.

"Now, your company did all the machining on this particular panel raiser head; is that correct?"

Mr. Callaway: "That is right."

Mr. Olson: "It was not sent out to be done?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "No, we did it all."

Mr. Olson: "As a matter of fact, isn't it a common occurrence in machining this type of casting to find blow-holes occasionally?"

Mr. Callaway: "No, it is not, in that type of casting."

Mr. Olson: "What is done with this type of casting if a blow-hole was discovered?"

Mr. Callaway: "If it was discovered, the men have orders to discard it; but I have never discovered any yet in this lot, these heads."

Mr. Olson: "Are blow-holes easily discovered in steel such as this?"

Mr. Callaway: "I would say you could see them, if they were there."

Mr. Olson: "That is, they would be visible on inspection to the naked eye?"

Mr. Callaway: "If they were there."

Mr. Olson: "Without a microscope?"

Mr. Callaway: "That is right."

Mr. Olson: "You wouldn't even need glasses, if you had ordinary eyesight?"

Mr. Callaway: "That is right."

Mr. Olson: "After assembling the panel head; that is, after [372] placing the knives on the casting, and the one part, No. 2, over No. 1, what, if any, tests are made on the whole assembly unit, before it is sent out to be sold, any?"

Mr. Callaway: "They are inspected and balanced by me."

(Deposition of Charles E. Meissner.)

Mr. Olson: "They are not actually run in operation, however?"

Mr. Callaway: "They are not run in operation."

Mr. Olson: "And this particular panel raiser head was not run in operation?"

Mr. Callaway: "That was not tried out in our shop."

Mr. Olson: "And no test was made, in the nature of an operating test; is that right?"

Mr. Lopardo: I would like to object to that on the ground it has been asked and answered twice.

Mr. Olson: This question has never been asked in this whole record.

The Court: Go ahead.

Mr. Callaway: "Like it would be used by this customer in California?"

Mr. Olson: "That's right; like it would be used by anybody, using it for normal purposes."

Mr. Callaway: "No, there was no test made."

Mr. Olson: "You understand the question?"

Mr. Callaway: "You want to know if it was tried out on a wood panel on the shaper in our shop?—No, no tests were [373] made like that."

Mr. Olson: "Like a customer would use it?"

Mr. Callaway: "No, no test was made like that."

Mr. Olson: "And you understand the question?"

Mr. Callaway: "That is right."

Mr. Olson: Let me add something here.

Mr. Callaway: You had better read the part you are going to add to.

(Deposition of Charles E. Meissner.)

Mr. Olson: "If there are a number of small blow-holes in any steel casting of the type we have mentioned here, it will weaken the strength of the steel; is that not a fact?"

"Let me add something to that: "As contrasted to anyother casting of the same type, size, shape, and all have the same components, in which there are no blow-holes; that is, as between the casting with blow-holes and the casting without blow-holes, the one with blow-holes is the weaker; is that true?"

Mr. Callaway: "That is true; but when you are talking about blow-holes I would like to talk about blow-holes in this head."

Mr. Olson: "We are not concerned with blow-holes in this head."

Mr. Callaway: "It is bound to be weaker."

Mr. Olson: The bottom of page 150, Mr. Callaway.

"Among the various causes that you mentioned, which could [374] cause breakage of a head of this kind, or of the particular head in question here,—you didn't use those terms; but striking a hard object in the wood would do it, wouldn't it,—strike a knot, striking a nail?"

Mr. Callaway: "On a piece of steel like this, working on a knot, no; a nail or a heavy iron object in it might."

Mr. Olson: "All right; an improper operation of the—what is the name of that machine, spindle, shaper?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Shaper; spindle is a rod where the head would slip over."

Mr. Olson: "Just a minute, I can look it up; I want to know what the machine was that this thing was mounted on?"

Mr. Callaway: "A tenoner or shaper."

Mr. Olson: "Wasn't this mounted on a double spindle shaper?"

Mr. Callaway: I don't find that.

Mr. Olson: Page 151, line 8. The answer is at line 10.

Mr. Callaway: "A double spindle shaper, or tenoner, or single spindle shaper; either one of the three."

Mr. Olson: "If the particular head in question were mounted on a double spindle shaper, and it was not operated properly, that could cause the head to break?"

Mr. Callaway: "It could."

Mr. Olson: "And defective steel could cause the head to [375] break, couldn't it?"

Mr. Callaway: "No, it could not."

Mr. Olson: "Defective steel could never cause the head to break?"

Mr. Callaway: "Not a head designed the way this is, cutting a light cut out of wood, it could not."

Mr. Olson: "I said just that one fact, if the steel were defective; I am not asking you to admit it was defective, but if the steel were defective, that could cause it to break, couldn't it?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "No."

Mr. Olson: "It could never break because of defective steel?"

Mr. Callaway: "No."

Mr. Olson: "Now, if you knew that there was a blow-hole in the arm which broke in this case would that make any difference in your answer?"

Mr. Callaway: "That wouldn't make any difference."

Mr. Olson: "If you knew there was a blow-hole right straight through the point where it broke?"

Mr. Callaway: "That wouldn't make any difference."

Mr. Olson: "Will you tell us, please, whether an excess of magnesium, phosphorus, or sulphur, could cause the head to break?"

Mr. Callaway: "No." [376]

Mr. Olson: "Now, do you know the operating revolutions per minute, what would be normal for the use of this head?"

Mr. Callaway: "What would be normal safety rpm would be about——"

Mr. Olson: "By rpm you mean revolutions per minute?"

Mr. Callaway: "Yes; say from 3200 to 7200 would be safe normal operating speed."

Mr. Olson: "And you might possibly even go to 10,000 on soft pine lumber, is that right,—safely?"

Mr. Callaway: "Oh, yes; there is a safety margin that it would sustain beyond that 7200, yes."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Up to 10,000 rpm?"

Mr. Callaway: "You could operate it; I cannot say you could operate it as safely as on 7200."

Mr. Olson: "But without nails, knots, or gravel, you could operate up to 7200?"

Mr. Callaway: "You could operate; but I would not say operate it safely."

Mr. Olson: "What would be the safe limits?"

Mr. Callaway: "7200, top limit."

Mr. Olson: "That is the maximum?"

Mr. Callaway: "That is the approximate recommended maximum speed; different shapers run different speed."

Mr. Olson: "The recommended speed of 7200, wasn't it; where was the maximum of safety?" [377]

Mr. Callaway: "There is a margin of safety *was* beyond that."

Mr. Olson: "Yes, up to 10,000 rpm?"

Mr. Callaway: "Yes, easily; but your safety is decreasing when you go up that high."

Mr. Olson: "But still, in soft pine lumber, without knots or other obstructions in the line, up to 10,000 rpm would be safe for normal operating, if the machine is in proper adjustment, and all that; is that right?"

Mr. Callaway: "Soft pine would not have anything to do with it; it is such a shear cutting there it would cut hard or soft."

Mr. Olson: "3200 to 7200 is the normal recommended range, is that right?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "About that, yes."

Mr. Olson: "Give me a figure,—a thousand over, five hundred over?"

Mr. Callaway: "You could probably run beyond 20,000; I am not saying it would be safe."

Mr. Olson: "I am talking about to operating maximum."

Mr. Callaway: "I am saying 7200, maybe 7500 will be safe; I am not saying anything over will be safe."

Mr. Olson: "Now, in making these heads, you do know, do you not, that if the casting is defective that might constitute a danger to the workman operating the head?" [378]

Mr. Callaway: "No, there is no danger."

Mr. Olson: "Even if the head is defective?"

Mr. Callaway: "What do you mean by defective?"

Mr. Olson: "Well, let us assume that the head has a crack through it, a blow-hole through it, half-way through the arm, would that be dangerous to operate?"

Mr. Callaway: "That would not be dangerous under normal usage, no."

Mr. Olson: "It would not?"

Mr. Callaway: "It would not."

Mr. Olson: "You are sure of that, are you?"

Mr. Callaway: "I am sure of that, under normal usage."

Mr. Olson: "Positive?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Positive; because that cut is so light."

Mr. Olson: "All right; suppose it hit an unseen knot in the wood?"

Mr. Callaway: "A knot would make no difference."

Mr. Olson: I just lost you here.

Mr. Callaway: Page 156.

Mr. Olson: You are on page 156?

Mr. Callaway: Yes. That is where the question was answered.

Mr. Olson: "Knots are encountered occasionally in woodworking?"

Mr. Callaway: "Oh, yes."

Mr. Olson: "And sometimes even nails or gravel?" [379]

Mr. Callaway: "That is possible."

Mr. Olson: "Would nails or gravel halfway through it?"

Mr. Callaway: "I couldn't answer a question like that; I wouldn't know what size nail."

Mr. Olson: "Would size of the nail make any difference?"

Mr. Callaway: "Say, for instance, they had a big spike in there, on the end of a two by four."

Mr. Olson: "That would be dangerous?"

Mr. Callaway: "That would be dangerous."

Mr. Olson: "In case the head strikes a big spike, or some other obstruction, it could disintegrate and blow all to pieces; couldn't that happen?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "It is not designed for metal cutting."

Mr. Olson: "But that could happen, couldn't it?"

"Do you know whether that could happen?"

Mr. Callaway: "I never heard of an instance where you ran into a spike."

Mr. Olson: "Please answer the question: If it would hit a spike, with the defective head I have described,——"

Mr. Callaway: "I couldn't answer that; I don't know, that is hard to say."

Mr. Olson: You are one ahead of me.

"Please answer the question: If it would hit a spike, with the defective head I have described,——"

Mr. Callaway: "I couldn't answer that; I don't know, [380] that is hard to say."

Mr. Olson: Now they are just squabbling.. Let's go to page 158, Mr. Callaway.

"Assuming that the arm down here at the base, between where the arm joins onto the rest of the casting,—assume there were a blow-hole in there, and assume that that was maybe one-quarter inch long, and varied in width from, oh, two or three thousandths, up to maybe .040 or .050 of an inch, and so extended through the width for perhaps .010 or .015 of an inch, would that constitute a dangerous condition in the head, under normal usage?"

Mr. Callaway: "Assume he hits a spike?"

(Deposition of Charles E. Meissner.)

Mr. Olson: "No, under normal usage; forget all about spikes."

Mr. Callaway: "No, under normal usage that would not be a dangerous condition to operate that head."

Mr. Olson: "You are sure of that?"

Mr. Callaway: "I am sure of that."

Mr. Olson: "And assume it hit a spike or a knot or a nail, would it then constitute a dangerous condition?"

Mr. Callaway: "A knot, no; spikes, I couldn't answer. I don't know how that spike is aranged in that wood; I don't know how the operator is speed the lumber, or how fast; I couldn't answer."

It is quarter to five, Mr. Olson. [381]

The Court: Do not look at the clock. I am going to finish.

Mr. Callaway: That is the reason I mentioned it.

Mr. Olson: Are we going to finish it all tonight, your Honor?

The Court: All the testimony will be finished tonight.

Mr. Olson: I am trying to eliminate as much——

The Court: I am not rushing you.

Mr. Olson: I will have to put this in.

Page 159, Mr. Callaway.

"Yes; now I am going to ask you to assume the following facts,—now, please bear in mind that this has nothing to do with your particular case, it is not your particular head, although it may sound

(Deposition of Charles E. Meissner.)

that way; but if you will listen carefully, these are all assumed facts, simply for the purpose of the question; assume the following facts: That on or about October 28, 1948, in or near Los Angeles, California, a workman is using a new Champion panel raiser head with a 1-1/4 inch bore, right hand, designed and manufactured by your company for cutting lumber; that this panel raiser head has an upper and lower cutter, which has been properly installed upon a double spindle shaper; this panel raiser head has had less than three hours use; it is operated up to that time without any difficulty, and in perfect, normal and proper fashion; the workman or operator [382] is using this panel raiser head upon new soft pine lumber containing no gravel, nails, or other hard objects; he is cutting the lumber, or shaping it to make a door; he is using ordinary and reasonable care for his own safety in such operation; now, if that panel raiser head had been manufactured with ordinary and reasonable care, inspected with ordinary and reasonable care, installed with ordinary and reasonable care, upon a double spindle shaper, and if the installation had been inspected and found proper, and if it had operated and been found proper for over two hours prior to the time in question, and if at the time in question it was being operated with ordinary and reasonable care and without striking any hard object, such as a nail, stone, or other hard objection in the wood, no breakage of or damage to the raiser head would result, would it?'

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Under normal usage, no."

Mr. Olson: Page 161.

"Now a further question: Under those circumstances which I have detailed, the panel raiser head would not break and disintegrate, would it?"

Mr. Callaway: "Under normal usage, no."

Mr. Olson: The answer is "No." At the bottom of page 161.

Mr. Callaway: That is where I am reading.

Mr. Olson: You said, "Under normal usage, no." [383]

Mr. Callaway: All right. "No."

Mr. Olson: "And the circumstances I have described are what you would term normal operation, are they not?"

Mr. Callaway: "If everything is right, and we know it to be right, and I should know it,——"

Mr. Olson: "I am talking about the elements that I detailed; they are all what you would include in normal operation; if not, tell me."

Mr. Lopardo: "Do you remember all the elements to that question?"

Mr. Olson: They are quibbling now. Page 163, at the top, Mr. Callaway.

Mr. Callaway: "I would say yes."

Mr. Olson: "And under that kind of operation, under those circumstances, the head would not break, in normal usage?"

Mr. Callaway: "In normal use, no."

(Deposition of Charles E. Meissner.)

9:11; that is all right."

This deposition commenced at 10:00 o'clock in the morning.

The Court: That serves him right, to have talked so much. [386]

Mr. Olson: We are nearly through.

"Now, at the time your company manufactured the particular head in issue here, you knew that it would be operated by a workman; isn't that right?"

Mr. Callaway: "Oh, yes."

Mr. Olson: "And you also knew at that time that unless it was structurally sound that it might break and injure somebody; is that true, unless it was structurally sound—that it might break and injure somebody?"

Mr. Callaway: "It was structurally sound."

Mr. Olson: "Answer my question: You knew at the time you made it that if it were not structurally sound it might break and injure somebody?"

Mr. Callaway: "What do you mean, not structurally sound?"

Mr. Olson: "What do you mean by structurally sound?"

Mr. Callaway: "Structurally sound is the way we make them, design it."

Mr. Olson: "Then you knew unless the head was structurally sound it might break and injure

(Deposition of Charles E. Meissner.)

somebody; you know that is the case of every tool you make?"

Mr. Callaway: "They are structurally sound; they are inspected."

Mr. Olson: "Let us forget this particular head, for the moment: You and I don't see eye to eye, because you think I am trying to do one thing, when I am trying to do another. [387]

"In the case of any tool that your company makes, if it is not structurally sound, if it is not properly made, it may be unsafe for the person who uses it—you know that, don't you?"

Mr. Callaway: "If it is not structurally sound, yes."

Mr. Olson: "And if this particular head had turned out not to be structurally sound, it might injure somebody; isn't that true?"

Mr. Callaway: "No, not the way it is designed."

Mr. Olson: "Assume for the moment it is structurally unsound, it is possible that, being structurally unsound, it could harm somebody; isn't that right?"

"At the time you made this particular head you knew if it were not structurally sound it would be unsafe?"

Mr. Callaway: "If I could see it—it was not unsound."

Mr. Olson: "Forget this particular head; any head that your company ever made, if it was not

(Deposition of Charles E. Meissner.)

structurally sound, might become unsafe to the user?"

Mr. Callaway: "If it was structurally unsound, that we could see it, it would never pass our inspection."

Mr. Olson: "But if it had been structurally unsound, and it had got by through some accident, it would be unsafe, wouldn't it?"

Mr. Callaway: "No, it would not be unsafe, the way that is constructed." [388]

Mr. Olson: "You mean it would be unsafe if it were improperly constructed?"

Mr. Callaway: "It was properly constructed."

Mr. Olson: "I am not talking about this particular head; any head, if the steel had blow-holes in it, it might become unsafe to the user; isn't that true?"

Mr. Callaway: "No."

Mr. Olson: "Why do you inspect it for blow-holes, because it might be unsafe with blow-holes?"

Mr. Callaway: "We just take those precautions; when a man is turning——"

Mr. Olson: "And you would throw a head out that had blow-holes?"

Mr. Callaway: "I have never thrown one out; but I would, yes, if I could see it."

Mr. Olson: "And the reason is because it would be structurally unsafe, isn't that right?"

Mr. Callaway: "Yes, it would be unsafe."

Instead of reading all that quibbling back and

(Deposition of Charles E. Meissner.)

forth, if you would get to the meat of the coconut——

Mr. Olson: I am trying to, but there is some of this I want the jury to hear. The bottom of page 170, Mr. Callaway.

“Would the presence of the conditions I have indicated; that is, first, a blow-hole or gas pocket in the base of the arm; secondly, a high phosphorus and silicon content—would [389] those indicate improper heating of the casting?”

Mr. Callaway: “That I couldn’t say.”

Mr. Olson: “Would they indicate improper cooling of the casting?”

Mr. Callaway: “I couldn’t say.”

Mr. Olson: “Or treating of the casting in any way?”

Mr. Callaway: “I don’t know.”

Mr. Olson: “Or manufacture of the casting?”

Mr. Callaway: “I don’t know.”

Mr. Olson: “As a matter of fact, the conditions that I have just described; that is, the break, the blow-hole or gas pocket in the arm at the base of the arm, and the high phosphorus and silicon content, which is double in that arm at that point what it was in the other arm, constitutes a dangerous condition in the casting, do they not?”

Mr. Callaway: “I would not say it constituted a dangerous condition in this casting.”

Mr. Olson: Page 173, top of the page.

“Now, an excess of silicon or sulphur or phos-

(Deposition of Charles E. Meissner.)

phorus in the casting could not be determined by everybody, by ordinary workmen in using the head, could it?"

Mr. Callaway: Is that page 173?

Mr. Olson: Yes. Line 7.

Mr. Callaway: "An average fellow working in a mill, running panel raiser heads, in our head he would not know if [390] it was, or not."

Mr. Olson: "He would not know whether it was sound or whether it was dangerous?"

Mr. Lopardo: I object to that on the ground it calls for speculation.

Mr. Olson: The witness answered the question.

The Court: Overruled.

Mr. Callaway: "He wouldn't know."

Mr. Olson: "And he wouldn't know whether there were blow-holes in it or not, would he; I mean if they were inside the metal?"

Mr. Callaway: "If they were inside, underneath the surface, he couldn't tell."

Mr. Olson: "If they were inside and underneath the surface, that could have been determined by either the foundry or by the manufacturer, if it was not the same as the foundry, by making X-ray or other tests?"

Mr. Callaway: "I couldn't say."

Mr. Olson: "You mean you cannot tell here whether blow-holes can be ascertained or found by X-ray?"

Mr. Callaway: "They could be found by X-rays, yes."

(Deposition of Charles E. Meissner.)

Mr. Olson: "These castings are never tested by X-ray at the foundry?"

Mr. Callaway: "I wouldn't know."

Mr. Olson: "You just said it was not necessary." [391]

Mr. Callaway: "It is not necessary."

Mr. Olson: "But you don't know whether they are actually made, or not?"

Mr. Callaway: "X-rays made at the foundry?"

Mr. Olson: "Yes."

Mr. Callaway: "I couldn't say."

Mr. Olson: "But blow-holes would be revealed by proper tests and inspection; is that right?"

Mr. Lopardo: That is objected to.

Mr. Olson: The question is rephrased.

"By tests, then you tell me what proper tests are; I don't know. You know they would be revealed by tests."

Mr. Callaway: "If they are turning, and they are underneath the surface, yes, you could see them."

Mr. Olson: "And you could ascertain whether blow-holes are in the metal, by proper tests?"

Mr. Callaway: That question wasn't answered.

Mr. Olson: "By tests ordinarily used on such castings they could be located; you know that, don't you?"

Mr. Callaway: "By certain tests, yes."

Mr. Olson: "By certain tests; is that right?"

Mr. Callaway: "Ask me what tests?"

(Deposition of Charles E. Meissner.)

Mr. Olson: "Use your own tests."

Mr. Callaway: "Underneath the surface, that you cannot detect with the naked eye." [392]

Mr. Olson: "No, but by other tests, there are tests?"

Mr. Callaway: "Yes."

Mr. Olson: "And there are tests for indicating blow-holes under the surface, as well as those that extend through the surface; isn't that right?"

Mr. Callaway: "Yes."

Mr. Olson, the witness has answered by saying you can tell them by X-ray.

Mr. Olson: You can tell it by X-rays?

Mr. Callaway: Yes. You just got through reading about ten questions back about that.

Mr. Olson: Mr. Johnston on page 177 says: "You are getting tired, and getting crabby." I can understand what he meant.

The Court: They indicate it. We are all human.

Mr. Olson: Page 178.

"Do you know whether anybody made any tests for hidden blow-holes?"

"Answer the question: Do you know whether anybody made any tests? All you have to do is say yes or no."

Mr. Callaway: "Yes."

Mr. Olson: "Who made such tests?"

Mr. Callaway: "We made those checks."

Mr. Olson: "By we, you mean your company?"

Mr. Callaway: "We check it for hours in the operation."

(Deposition of Charles E. Meissner.)

Mr. Olson: "For hidden blow-holes?" [393]

Mr. Callaway: "That is right, in the machining itself."

Mr. Olson: "But the machining would not show hidden blow-holes, under the surface?"

Mr. Callaway: "That you couldn't see."

Mr. Olson: "So you didn't make any test for hidden blow-holes?"

Mr. Callaway: "That is not necessary."

Mr. Olson: "Answer my question."

Mr. Lopardo: He has answered.

Mr. Olson: "Did you make any tests for hidden blow-holes?"

Mr. Callaway: "I said yes."

Mr. Olson: "What was that test?"

Mr. Callaway: Well——

Mr. Olson: Go ahead, please.

Mr. Callaway: "While it was being machined."

Mr. Olson: "All right, what was the test?"

Mr. Callaway: "Well, when a man is machining he can tell if he runs through a blow-hole, or not."

Mr. Olson: "I am talking about hidden blow-holes, under the surface."

Mr. Callaway: "When you are machining you are running underneath the surface."

Mr. Olson: "Were there any tests made for blow-holes beneath the surface of the machining?"

Mr. Callaway: "Not beneath the surface of the machining." [394]

(Deposition of Charles E. Meissner.)

Mr. Olson: The bottom of page 180.

“The machinist, mechanic, or whatever you call him he made a test by visual inspection, with the eyes, for blow-holes that came through the surface?”

Mr. Callaway: “While he was machining that, yes.”

Mr. Olson: “That is the only test he made?”

Mr. Callaway: “Yes; you said test beneath the surface; that is beneath the surface.”

Mr. Olson: The top of page 182.

“It would not weaken it”—oh, that is an answer. Excuse me.

“No matter how large it was?”

Mr. Callaway: “No matter how large, the way that is constructed.”

Mr. Olson: I think that is all.

Mr. Lopardo: Do you want to do anything on redirect examination?

Mr. Callaway: No. With that, if the court please, we will rest.

The Court: The clerk will mark the depositions and file them as a defendant's exhibit.

The Clerk: Defendant's Exhibit G, in evidence.

(The document referred to was marked Defendant's Exhibit G, and was received in evidence.)

The Court: Is there any rebuttal? [395]

Mr. Olson: No rebuttal.

The Court: Ladies and gentlemen of the jury, you will be excused until Monday morning. I have changed my mind about tomorrow. So long as the arguments cannot be concluded this afternoon we will adjourn to Monday. I can see no reason why we cannot observe the usual recess to Monday, at least.

Ordinarily we do not try cases on Monday. Monday is reserved for motions. In view of the fact that I have just come from the criminal department, during which time no civil cases were sent to me, I have not accumulated many, so I can try cases on Monday, too, as well as hearing the motions.

Counsel have some matters to discuss with me regarding the instructions after you have gone this evening. So far as you are concerned, we will adjourn until 9:00 o'clock Monday morning, if that is convenient. Will that be inconvenient to anyone that lives at a distance?

A Juror: Yes. I have to get up at 6:00 o'clock to get here at a quarter of ten. I live in Long Beach.

A Juror: I have to get up at 6:00 to get in here from Burbank. The bus service is very bad.

The Court: I am trying not to make it too difficult. We set just so many cases and they have to be tried. Otherwise the man whose case is set for next week cannot have his [396] trial promptly. In order to try the cases promptly we have to have everybody's co-operation, to get the cases out of the way.

or connection between the defect, if any, of the device and the injuries received by the plaintiff.

Mr. Olson: May I reply to that?

Mr. Callaway: That is all.

Mr. Olson: Do you want me to reply to that?

The Court: Yes.

Mr. Olson: In opposition to defendant's motion for a directed verdict, his first ground is no negligence has been shown by the plaintiff, and I submit that negligence is shown both by the testimony of the witnesses for the plaintiff and by the defendant's own testimony, as borne out in the depositions.

Further, even for the purpose of argument, granting that no negligence, actual negligence is shown under the doctrine or *res ipsa loquitur*, the matter must go to the jury on that question of negligence.

So far as the ground of no causal connection is concerned, between the deft and the injury, "causal connection" is, in [399] my opinion, the wrong words. He means proximate cause, I assume. In other words, it was a defect that was the proximate cause of the injury. I believe that is, without a doubt, established. For that reason I oppose the motion.

The Court: I am not so sure, gentlemen, that the evidence presented by the defendant in this case does not come within one of the cases cited, where the Court of Appeals, District Court of Appeals, heard that upon a showing of inspection and precaution which conformed to the ordinary inspection, that the burden has been met.

The difficulty of the problem lies, however, in the fact that while so holding in the particular case, they have said that ultimately, whether the evidence offered on the part of the defendant shows the taking of ordinary precaution is a question of fact, and where there is a jury it is a question of fact for the jury.

Fortunately, under our procedure, there is a method that can be provided. There is a method which can be pursued, and which I have pursued in several cases, which leaves open for determination later on, after a verdict, of any questions that may arise from the insufficiency of the evidence.

While I have kept in touch with the doctrine of *res ipsa loquitur*, I may say that this is the first case since I left the Superior Court that I had with a jury involving the application of this doctrine. In your study of the cases, you [400] probably ran across some of my cases that went to the Court of Appeals. One of them is the famous case, the one against the Southern California Gas Company, the gas riser case.

Mr. Olson: Chester?

The Court: The Chester case. I divided the courts in that case. The Court of Appeals ruled one way and then the case went to the Supreme Court, and I had everybody in the State of California, including my best friends, appearing as *amici curiae* against me, including my old friend, Hiram Johnson, who is probably as much responsible for my being a judge in the State of California as anyone.

I am pointing to that to show that the problem is a very difficult one. In that case the court said that my own reactions to the facts did not satisfy them. I thought the company had taken sufficient precaution by examining those risers. It had not been shown what broke them, and the presumption would be because the explosion happened after a man drove an automobile over the lot that probably he did it.

To give ourselves an opportunity to discuss the matter more fully, if necessary, I shall follow the procedure which, as you know, harms no one, and that is in the procedure prescribed by subdivision B of Rule 50. Regardless of what the jury verdict is, I shall reserve ruling on the motion until after the verdict. At that time we will determine the motion and counsel will have further opportunity to discuss [401] the matter in the light of the verdict.

I may say that this method has great advantage. I used it in the Northern District of California a year ago last July when I sat there, where I granted the motion after the verdict of the jury, contrary, of course, to the verdict.

I placed the case in this position: that if the Court of Appeals agreed with me, then there would be no new trial. If they did not agree with me, all they had to do was restore the verdict. That particular case was an insurance case. That was the Bolter case. You probably remember it.

Mr. Callaway: Yes.

The Court: It involved an insurance company. It involved the interpretation of a use clause in a truck liability situation, being limited to the time when a truck is used in hauling goods for profit only. The court did not agree with me. They held that there was evidence from which the jury could infer the man was not on a vacation trip, but was engaged in something incidental to his business. They merely restored the verdict of the jury.

I am merely making this statement in case you may not be familiar with all the implications of this ruling, and so that you will not be worried about it. It does not do anyone any harm. It keeps matters as they are, until we hear from the jury, and then whatever I do is done in such a manner that ultimately the opportunity is given for a higher court [402] to deal with the case on the basis of the verdict of the jury. I believe in this case, because of the nature of the case and the nature of the testimony, it is better to handle it in this manner. The ruling will be reserved.

Gentlemen, under the rules of Federal Procedure I am required to inform you before the arguments of my actions on your instructions. The object is to give you a little more freedom in arguing to the jury and, as you know, after the instructions have been read the court will ask whether you have any objections. If you have any objections, they can be heard in the absence of the jury.

I am making this statement because some judges,

like Judge Harrison, combine the two in one. I do not do that. For one thing, I change my mind so rapidly that when I read instructions I sometimes may remove one that I told you I was going to give. Unless I gave you another chance you never would have an opportunity to make your objections. That is one place in the Federal Procedure where you cannot urge error unless you have objected.

You have saved me a lot of labor by confining your instructions to merely your theory of the case. That is all I ask of counsel, because the general instructions I prepare myself and I give them in all cases. Many of them have stood the test four or five times before the higher courts.

There is one thing I want to remind you of, and that is to [403] please number the instructions. If you number them with pencil it will be all right. It helps me to indicate to you what I have done to the instructions.

We will take the plaintiff's instructions in order. No. 1 is an instructed verdict, which I shall not give.

No. 2 I am inclined to give, Mr. Callaway, because I do not think there is any evidence from which contributory negligence can be inferred, although you did not request this instruction, I will give an instruction about defining an unavoidable accident.

I am frank to say I cannot see what evidence there is in the record from which any contributory negligence can be inferred. If you can point out to me anything from which you could argue it, I will be glad to listen to it.

Mr. Callaway: I will make this one observation. The plaintiff's own testimony is he heard a clicking and ducked down under the table before there were any parts that fell. Actually, we weren't there and couldn't prove that.

If the court does not feel that has any bearing on the matter, all right. That is the only observation I would like to make.

The Court: That is an argument that can be made to the jury, as to whether his injury was really caused by any defect. But that does not show that he failed to do anything that he should have done. It is the ordinary reaction of a [404] person who hears an unusual noise and is afraid of things falling, and he would duck. And that is what he did.

Mr. Callaway: I am not saying the ducking is contributory negligence.

The Court: What is it, then?

Mr. Callaway: To leave the machine and his wood free there and go off his guard suddenly might be said to have been negligence, in view of the fact that there has been no explanation of what caused this to break. That is my only comment.

The Court: I will make a note of that and think of it.

Mr. Olson: May I say something in that connection?

The Court: Yes.

Mr. Olson: Leaving the machine a man is working with, a dangerous instrumentality, and he hears

an unusual sound, he would actually be negligent if he didn't leave the machine as fast as possible.

I would venture to say if Mr. Byrne had stood there and that piece had gone through him and not ducked they would have said it was negligence on his part. The fact he did duck, they say, is negligence. I think the argument is double-headed.

The Court: Wait a minute. The question before me is not a question of fact. The question is whether I should instruct the jury, as a matter of law, there is no contributory negligence. [406]

Mr. Olson: There isn't any.

The Court: That is the point.

Mr. Olson: There is no evidence——

The Court: If there is any from which an inference can be drawn, then I will give the jury a definition of contributory negligence. As you know, I have reviewed very recently for an opinion I am working on for the Circuit Court of Appeals, I have had on review practically all the late cases, down to 84 Cal. App. (2d), dealing with the problem.

The California courts have been so liberal in holding that the question of negligence, contributory negligence is a case for the jury unless, they say, it can be said that under no possible approach or view of the evidence could a jury infer that there was negligence. I will give the matter some thought. If I change my mind, you will find it out. But at the present time I am inclined to think that that instruction will not be given.

Mr. Callaway: I am going to have to leave Mr. Lopardo here and he will make notations of what instructions you give and what instructions you do not. He knows my views.

The Court: It will take me not more than five minutes. I will go through the entire instructions in five minutes.

The next number, which I will call 4, is merely a definition of proximate cause. I will give a definition of [406] proximate cause of my own.

I am giving a definition of negligence, what negligence is. Even the law of *res ipsa loquitur* is grounded on negligence. I will give a definition of what negligence is.

Mr. Olson: I assume you would.

The Court: I will define proximate cause. The next three I will give. The last one I will modify by inserting the language——

Mr. Olson: The one that starts out, "There is in our law a doctrine applying——"

The Court: Yes. I will modify it by putting in the clause from the O'Rourke case you eliminated, which says, "However, the manufacturer is not responsible for defects that cannot be found by a reasonable, practicable inspection." Those are the identical words of the case.

Mr. Olson: No objection.

The Court: The next one beginning, "From the happening of the accident," will be given as modified, and the modification occurs after the word "evidence," by putting in the following: "Unless

overcome by contrary evidence or inferences from such evidence."

Mr. Olson: "As established by the evidence," you mean to put it in right after that?

The Court: "Unless overcome by contrary evidence or inferences from such evidence." The inferences the jury can [407] draw from such evidence. They are entitled to do so, not only contrary to the evidence, but to the inferences that can be drawn from contrary evidence.

The next one I will give, except that I will put in a clause. I will not stop to give you the wording of it. I will add to it so as to tie this to the defense, also. I will put in a clause to the effect that the accident was not due to the fault of the installation or operation over which the defendant had no control.

Mr. Olson: Oh, yes.

The Court: That is all. I will substitute my own instructions on damages and general damages.

Here is a problem that arises in this case: In your complaint, under your prayer for special damages, you only include your medical expenses. You do not include the loss of wages.

Mr. Olson: That is due to the fact I have a new secretary. May I ask the court to put that in?

The Court: The Hildebrand firm does not separate them. I have tried to cure them of that habit. I have not succeeded as yet. That is the custom they use in the northern part of the state, they include both general and special damages.

Mr. Callaway: On the medical aspect, there is no evidence this man said he was entitled to between \$350.00 and \$400.00 [408] for medical. No witness expressed the opinion that was the reasonable value of any services rendered to him. He presented no medical bills in this case. I don't see how——

Mr. Olson: No contrary evidence he didn't pay that.

The Court: There is liability. I will give a general instruction as to that. There is no evidence of reasonableness, that is true.

Mr. Olson: It speaks for itself. I am just speaking unjudicially. I think it is a very minimum amount.

The Court: I will give a general instruction to the jury explaining the nature of special damages, and then you gentlemen can argue whether there is any proof of reasonableness, and instead of having a maximum which I do not have, because there is not one here, I will merely say "as prayed for in the complaint."

Now, as to yours, Mr. Callaway, yours as a matter of fact, complement the other instructions. I am going to give No. 1, the one on O'Rourke. And your No. 2 and No. 4.

I am not going to give No. 3 because it is based on Gerber, and I don't agree with that phase in Gerber.

Mr. Olson: I agree with you. Thank you.

The Court: I think those dovetail, and if I can catch any repetition I may discard some of them.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right, nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, [413] satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given to you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do.

You are the sole judges of the effect and value of the evidence. Your power, however, of judging of this effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion, and insubordination to the rules of evidence. You are not bound to decide in conformity with the

declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your mind. In other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does not satisfy your minds. [414]

In weighing the evidence, you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character, as shown by the evidence, their manner on the stand, their relations to the parties, if any, their degree of intelligence, and the reasonableness or unreasonableness of their statements, and the strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty, or integrity, or by his motives or by the contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and being convinced that a witness has stated what is untrue, not as the result of mistake or inadvert-

ence, but wilfully and with a design to deceive, you must treat all of his testimony with distrust and suspicion, and reject it all unless you shall be convinced notwithstanding the base character of the witness, that he has in other particulars sworn to the truth. [415]

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or comport with some fact or facts otherwise known or established by the evidence. You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts.

Such statements, arguments, comments or suggestions are not evidence and must not be considered as such by you. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inference which you may deduce therefrom as stated in these instructions, and upon the law as given you in these instructions.

In a civil case, such as this, the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of evidence. The law does not require a demonstration, that is, such a degree

of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. The burden is upon the plaintiff to prove his case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight [416] of the credible evidence as you find it to be. Or such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider expert opinion. However, you are not bound by such an opinion. You should give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if in your judgment the reasons given for it are unsound.

By this action plaintiff seeks to recover general damages in the sum of \$30,000 against the defendant and additional medical expenses and loss of wages by reason of injuries alleged to have been suffered by the plaintiff while operating a panel head on October 28, 1948, in the course of his employment by the Selby Company. The plaintiff alleges that the defendant was negligent in the manufacture,

sale and delivery to the plaintiff's employer of a structurally [417] defective panel head, and that such negligence caused his injuries.

The plaintiff was not the employee of the defendant.

The defendant has denied any negligence on its part and liability towards the plaintiff.

Negligence is the omission to do something which a reasonable person guided by those considerations which ordinarily influence a person of reasonable prudence would do under all the circumstances of the situation in question, or the doing of something which a person of ordinarily reasonable prudence would not do under all the circumstances of the situation in question. The question of whether or not there was negligence in a particular instance would be determined by you from all the circumstances and conditions as shown in the evidence at the time surrounding the person to whom the negligence is charged.

Negligence is a comparative and not a positive term. It always relates to some circumstance of time, place or person. It is determined in all cases by reference to the situation and knowledge of the parties and to all the attendant circumstances.

The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any new, independent cause, produces the event and without which that event would not have occurred. [418]

There is in our law a doctrine applying to neg-

ligence cases which is commonly known as the doctrine of “*res ipsa loquitur*.” Literally translated from the Latin, this means, “the thing speaks for itself.”

That doctrine means that if a subject matter is shown by the evidence to have been manufactured and supplied for a particular use, and an injury to some person results from such usage, which would not have occurred in the ordinary course of things, if ordinary and proper care had been used in its manufacture, the thing or subject matter speaks for itself and the law raises the presumption that the manufacturer did not use ordinary and proper care in its production. The burden would then be on the manufacturer to substantially prove that ordinary and proper care was used in the manufacturing and supplying of such subject matter.

However, the manufacturer is not responsible for defects that cannot be found by a reasonable, practicable inspection.

In this case if you find from the evidence that plaintiff was injured by the disintegrating or breaking apart of the appliance in question, described as a “Panel Raiser Head,” while plaintiff was employed by the Selby Company in connection with its use for the purpose for which it was manufactured and supplied and if you further believe from the evidence that this accident and injury would not have occurred if the panel raiser head had been properly manufactured and constructed and ordinary and proper care had been used in its

manufacture, and that the accident was not due to faulty installation or operation over which the defendant had no control, you are instructed that these facts would raise a presumption of negligence on the part of defendant in failing to use ordinary and proper care in the manufacturing and supplying of the panel raiser head. The burden of proof would then be on the defendant to overcome this presumption and free itself from the charge of negligence by substantially proving that it did use ordinary and proper care in that respect.

You are instructed that if the defective condition of the part, if you find that the injury resulted from such defective condition, could have been disclosed by reasonable inspection and tests, and such tests and inspections were omitted, then the defendant has been negligent.

You are further instructed that reasonable care under this instruction consists of making inspections and tests during the course of manufacture, and after the article was completed, which the manufacturer should recognize were reasonably necessary to secure the production of a safe article considering the nature of the article and the purpose for which it was to be used.

When in the manufacture of such an article as the panel raiser head here involved there is used any material or part obtained from a source outside the manufacturing plant in [420] question, it is the duty of the manufacturer to make such inspections and tests of that imported material or

part as ordinary prudence would indicate to be necessary, to the end that the safety of the finished article for the intended or invited use will be reasonably certain. Failure to fulfill that duty is negligence. On the other hand, if the manufacturer performs that duty, and the inspections and tests do not indicate a defective or dangerous condition, and it does not know of such a condition, it is not liable for injury resulting from its use of such material or part, although it later proved to be defective.

The reasonableness of the inspections necessary to determine whether a manufactured article is safe for use varies with the circumstances of each case, and the purpose for which the article is intended must be considered, that is to say, that a manufactured article need not be absolutely safe for all purposes but only for the purpose for which it was manufactured; therefore, if you find that the defendant properly made inspections reasonably designed to find defects which would render the panel raiser head unsafe for cutting and trimming wood, you must find that those inspections were reasonable; and if you find that the said inspections did not reveal any such defects in the panel raiser head, then you must find that the defendant was not negligent in the manufacture of the panel raiser head. [421]

You are instructed that the degree of care necessary to be exercised by a manufacturer in the production of a product varies with the danger to be

expected from the product, and you are further instructed that the kind of inspection called for on the part of the manufacturer varies with the nature and danger of the thing inspected.

Reasonable care is making the inspections and tests during the course of manufacture which the manufacturer should recognize as reasonably necessary to secure the production of a reasonably safe article; therefore, if you find that the defendant properly inspected the casting which it purchased from another manufacturer, and if you find that the defendant properly inspected the completed panel raiser head you must find that defendant exercised reasonable care.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

If your verdict be for the plaintiff, the measure of his recovery is what is denominated compensatory damages, that is, [422] such sum or sums as will compensate him for the injuries sustained. The elements are the following: Just a moment, gentlemen. Counsel need not look at the instructions. You do not have this one. This is my own.

Incidentally, all the instructions are rewritten on

government paper so there is no indication whatsoever where they came from. I am making that statement because of the statement I made for the jury that I will allow them to receive the instructions.

Jurors, of course, know that counsel submit instructions and the court then passes on them. But the instructions I give you are my instructions, regardless of who suggested them.

Such sum, if any, as will compensate for expenses incurred and to be incurred in medical treatment, if any, and medicine and other expenses and wages lost not exceeding the amounts prayed for in the complaint.

Such sum, if any, as the jury shall award to the plaintiff on account of the pain and suffering and mental anxiety, if any, suffered or which he is certain to suffer in the future, if any, not to exceed the amount claimed by him in his complaint.

The first element of damages is the subject of direct proof and is to be determined by the jury on the evidence before them. It is called "special damages." [423]

The last element, however, the one which is called general damages, is, of necessity, left to the sound discretion of the jury, to be determined from the evidence they have before them, and the law of the case as given them by the court in the instructions.

The law does not require that the plaintiff present any direct evidence to show the amount of general damages which he has sustained by reason of the

personal injuries and suffering sustained by the plaintiff, if any, or the amount of money which would compensate him for such injuries and suffering, if any. All that is necessary in this behalf is to show to the jury the extent of such injuries and suffering, if any, and that they were proximately caused by the accident. Then it is for the jury to determine, in the manner I have indicated, the amount of damages, if any, which ought to be awarded to the plaintiff therefor, if any.

Mental worry, distress, grief and mortification, if any, which a person suffers or is certain to suffer by reason of his physical injuries growing proximately out of an accident, are proper component elements of that mental suffering and anxiety for which the law entitles one injured through the negligence of another proximately causing such injury, to redress, if it appears from the evidence that such mental anxiety is proximately caused from the injuries received in such accident. [424]

You are instructed that special damages as distinguished from general damages are those which are natural but not necessary consequences of a negligent act. They are damages which, as such, were incurred by the particular individual by reason of the particular circumstances. They are such as will compensate plaintiff for the reasonable value, not exceeding cost to plaintiff, of the examinations, attention, care by physicians and surgeons, reasonably required and actually given in the treatment of plaintiff, and reasonably certain to be required

and to be given in his future treatment, and included in such care, X-ray pictures, the reasonable value not exceeding the cost to plaintiff of the services of nurses, attendants, hospital accommodations and ambulance service, if any, and reasonably certain to be required and given in his future treatment, if any, and finally, the special damages are such as will compensate plaintiff for the reasonable value of the time lost, if any, by plaintiff since his injury wherein he has been unable to pursue his occupation, if you find that he were to so engage in his occupation or other occupation. In determining this amount, you should consider such plaintiff's earning capacity, his actual earnings, and the manner in which he ordinarily occupied his time before the injuries, and further consider the evidence as to the probability and possibility of plaintiff pursuing his occupation or any other occupation in the future.

You are instructed that the amount claimed by the plaintiff is not to be considered in any wise by you as a criterion of damages, if any, suffered by plaintiff, nor shall any such claim in his complaint be taken by you as indicating that plaintiff is entitled to any damages whatsoever. Before you may even consider the question of damages, you must first determine from a fair preponderance of all evidence that the defendant was negligent, and that such negligence, if any, was the direct and proximate cause of the injury of which the plaintiff complains.

The fact that I have instructed you upon the

measure of damages is not to be taken by you as an intimation that I believe that the plaintiff is entitled to recover damages.

These instructions are given you solely to aid you and to guide you in finding a verdict in the case in the event you find that the plaintiff is entitled to recover.

If from the evidence and under the instructions as I have given you, you do not believe the plaintiff is entitled to recover, then you are to return a verdict in favor of the defendant, and the instructions given on the subject of damages lose their entire significance and need not be considered at all.

Your first duty upon retiring to the jury room to begin your deliberations in the case will be to select one of you to act as foreman in the case. Foreman means either sex. [426] A forewoman is also a foreman. We use the masculine to cover both.

For your assistance the clerk has prepared two forms of verdict, reading as follows: Title of court and cause.

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against the defendant, Woodworkers Tool Works, a corporation; and fix the plaintiff’s special damages at, and fix plaintiff’s general damages at

“Dated: February . ., 1950.”

If you decide in favor of the *defendant*, then you will use this form of verdict and indicate at

the place indicated such amount as you think he should recover as special damages and/or as general damages.

The other form of verdict reads as follows:

“We, the Jury in the above-entitled cause, find in favor of the defendant, Woodworkers Tool Works, a corporation, and against the plaintiff, William J. Byrne.

“Dated: February . . , 1950.”

If you find in favor of the defendant, then you will use this form of verdict.

Whatever your verdict is, it should be dated and signed by the foreman, and returned to this court.

Are there any objections to any of the instructions given or refused? If so, opportunity will be given to present such objections outside the hearing of the jury.

Mr. Callaway: Yes.

Mr. Olson: Yes. Mine is not an objection. It is a question I would like to ask outside the hearing of the jury.

(The following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Olson: I have two questions. In the Sheward case the court held that in giving them an instruction the Court did not give an unavoidable accident instruction and that was sustained by the Supreme Court. So I object to the unavoidable accident instruction.

The Court: The court said that the failure to

give was not error. It was not specifically pleaded here, and I gave the instruction.

Mr. Olson: That is a minor one.

The Court: All right.

Mr. Olson: The other is that I feel that under the evidence in this case that the instruction that the plaintiff was free of any contributory negligence should have been given.

The Court: The reason I did not give it was twofold. There is nothing before the court, there is nothing before the jury—— [428]

Mr. Olson: I noticed that.

The Court: I did not state they pleaded contributory negligence. They are the ones, they did not request it and they did not argue contributory negligence. To give an instruction of contributory negligence would confuse the jury.

Mr. Olson: I wanted the instruction that under the evidence there is no contributory negligence.

The Court: I left it silent. I thought that over very carefully over the week-end and I decided not to do anything about it. They will think I am taking an issue away from them.

Mr. Callaway: I want to object to giving of the instructions on the doctrine of *res ipsa loquitur* on the ground that the courts have not extended that doctrine in the case of the manufacturer, to my knowledge, except in the beverage cases. Even *MacPherson v. Buick* is not a *res ipsa loquitur* case. I think that is the leading case on which all these cases are bottomed.

Mr. Olson: In answer to that, in answer to this Kalash case, it was a *res ipsa loquitur* case.

Mr. Callaway: I don't think it was.

Mr. Olson: Yes, it was.

The Court: Gentlemen, I am of the view that the Supreme Court of California has intimated that it will extend the case [429] to other manufactured objects than merely bottling cases.

Mr. Olson: They did in the Sheward case.

The Court: I am familiar with the cases. The objections will be in the record, and will be overruled.

(The following proceedings were had in the presence and hearing of the jury:)

The Court: For the benefit of those jurors who have not served in a case this term or served in a federal case before, I will explain to you that under federal law, in that respect, it differs from the state law. The court tells counsel before the arguments, in a general way, what the court's action has been on instructions that each side have submitted. And that is in order to enable counsel to anticipate and argue to you, to some extent, as to what the court is going to say about the law. But they do not actually know what the court is going to say about the law until all the instructions are read, and then the law requires them, after the instructions are read, to offer any objections or suggestions they have.

We live, fortunately, in a country where not even judges are supposed to be infallible. There is a

possibility of error, and this opportunity is given to counsel to call the court's attention to any omissions or errors in the instructions. The court may then consider them and if the court feels that the suggestions should be followed, the court then [430] modifies the instructions.

If, after discussing certain matters with counsel, the court decides that the instructions as given do not need any modification, then the instructions are not modified. These instructions, as I have given them to you, will stand.

The clerk will swear the bailiffs.

(The bailiffs were sworn by the clerk.)

The Court: You will now follow the bailiffs and begin your deliberations in the case. I presume I ought to inform you, although you may know it, that if after you organize you desire to go to lunch before you begin your deliberations, all you have to do is make that wish known. I will leave that to your determination.

You may want to do some work before you go to lunch. That will be up to you.

I hand the bailiff the two forms of verdict which he will turn over to you. You will now follow the bailiff and begin your deliberations in the case.

(The jury retired from the court room for deliberation.)

The Court: Mr. Clerk, I file with you the instructions given and the instructions refused.

Gentlemen, I demonstrated to you the correctness

of the procedure because you will notice that I withdrew, after I began to read the instructions, one or two which I felt were repetitious. Of course, I decided not to give any instructions [431] on contributory negligence or the absence of it, because the issue was not argued and I thought to give them either an instruction on the meaning of it or an instruction on the fact it did not exist would insert an issue which was not argued and, as I did not mention any particular defense in the instructions, that it would be better to leave that out.

Mr. Callaway: I would like a couple of stipulations from counsel. I would like it to be stipulated that in the event of a judgment for the plaintiff that execution be stayed for 10 days, until after proper motions before the trial court have been made.

Mr. Olson: That is automatic, isn't it?

Mr. Callaway: Is it in Federal Court?

The Court: No.

Mr. Callaway: I didn't think it was. Will you stipulate to that?

Mr. Olson: I don't know how I can stop you making any motion you want to. I don't understand what you want.

Mr. Callaway: I am asking for a stipulation. I want a stay of execution for 10 days, until all motions are made in the trial court, in the event of a judgment for the plaintiff.

Mr. Olson: I think it is the customary thing.

Mr. Callaway: Will you so stipulate?

Mr. Olson: Yes. [432]

The Court: We will stay at recess until we hear from the jury.

(Thereupon, at 12:20 o'clock p.m. a recess was taken until 6:10 o'clock p.m. of the same day.) [433]

Monday, February 20, 1950

The Court: Let the record show the jury have returned.

Mr. Caldwell, you are the foreman of the jury?

Mr. Caldwell: Yes.

The Court: Mr. Caldwell, in answering the questions be careful in the way you answer them, because while there are certain matters you are permitted to disclose in Federal Court there are certain matters that go on in the jury room that cannot be disclosed.

If I ask any question relating to the manner in which you stand, do not refer to any person. Answer my questions in a general way. Do you understand?

Mr. Caldwell: Generalities.

The Court: You sent me a statement a while ago stating you thought you were hopelessly in deadlock, is that not true?

Mr. Caldwell: That is true.

The Court: What was the answer I sent to you through the clerk?

Mr. Caldwell: To carry on for a while longer.

The Court: Now it is after 6:00 o'clock, and I

asked the clerk a while ago to ask you jurors if you desired to go to dinner. Your answer was what?

Mr. Caldwell: At 7:00 o'clock.

The Court: You wanted to wait until 7:00 o'clock? [434]

Mr. Caldwell: That was the consensus of opinion, yes.

The Court: All right. Do you believe that further deliberation will result in a verdict?

Mr. Caldwell: My belief is it may.

The Court: All right. Now, let me ask you one other question. Would any amplification of any instruction assist you in any way.

Mr. Caldwell: At the time the panel was made up there were certain questions propounded to each juror.

The Court: Yes.

Mr. Caldwell: Would it be in order to have those questions propounded again?

The Court: No, that cannot be done. That has passed. Those matters relate merely to the qualifications of the jurors to act in a particular case, and those are beyond any matters of inquiry at the present time.

The only way I can be of any assistance to you is to amplify any instructions that have been given or to have any portion of the evidence read that has been given. As you know, everything is taken down by the reporter and any portion can be read back that you might request or any other juror. Any portion of the testimony can be read back as

to which there may be any argument or dispute about in your minds. If it takes hours, we will stay and do it.

You jurors are new at this and I am merely indicating in [435] this manner that if there is any way in which the court can help, I will do so, because both counsel and the court are anxious there be a verdict in this case.

I do not want to crowd you. If you need more hours, we will stay here all evening, if necessary. The only reason I brought you down is because, frankly, I misunderstood the message, the message you sent me about dinner. I understood the message to contain an implication that you wanted to deliberate until 7:00, that you might reach a verdict, or I possibly would not have called you in. At any rate, no harm has been done.

Ladies and gentlemen of the jury, I have given you the instructions. Our duty is over. It is up to you to follow the instructions and the law, as you have sworn to do. As to the facts, it is up to you to interpret the facts. The facts are the facts that were testified to in this court, and nothing else. I cannot give you any additional testimony. You cannot draw on anything that you yourselves may know. Counsel cannot get up and make further argument. All we can do is to give you additional instructions or read any portion of the testimony you may desire. Your verdict must be based upon what is in this record. What is not in the record we cannot supply at this time, it is too late.

It may well be that counsel for one side or the other missed something, and that something that is missing may give [436] you some trouble. If what I say does not meet with the approval of counsel, they will ask that it be rectified. They have a right to do that. I am merely telling you that we can do certain things, and if those things will be of any assistance to you we will give them to you. They consist only of giving you additional instructions on the law or reading to you any portion of the testimony as to which there may be any doubt. That may relate both to the depositions and to the testimony, oral testimony that was given. I would not send out the depositions because there are portions of the depositions stricken out. Any portion of the depositions that was allowed that you want to have read again, it will be done.

Do any of the jurors have any desires in that manner?

A Juror: Your Honor, I would like to have the instructions as to the evidence presented here in court, whether the jurors must abide by the evidence or can set evidence aside for something more constructive.

The Court: Well, I can only repeat that the evidence on which the case must be based is the evidence given in this court. No juror has the right to be governed by anything he may know that goes counter to the evidence. Of course, as an ordinary person he has a right to draw inferences from evidence of the type that any reasonable

person would draw. That is about all the answer I could give to that [437] question.

A Juror: I understood your Honor to read in your instructions to the jurors they can either believe some portion of the evidence or believe the whole of it or part of it, or none at all.

The Court: There was no such instruction.

Mr. Clerk, let me have the instructions.

The Clerk: I believe they are upstairs in the jury room. The jurors have them.

The Court: I will send the bailiff to get them. All I said was this: That you are the sole judges of the evidence and the effect of the evidence, and that in determining that effect you must be governed by the manner in which witnesses testify and by their demeanor on the stand and their interest in the case. That is what you may be referring to, that a witness false in one part of his testimony may be distrusted as to others.

But even as to such a witness, if you believe that he falsely testified as to some matters you may, notwithstanding that fact, still believe that he told in other particulars the truth. That is the reference. I did not say you should disbelieve all the testimony. If you did that you would be in a position where you could not render a verdict for the plaintiff or the defendant.

What I said was this: "Preponderance of the evidence [438] means the greater weight of the credible evidence as you find it to be. Or such evidence as, when weighed with that opposed to it, has more convincing force, and from which it re-

sults that the greater probability is in favor of the party upon whom the burden rests.”

I explained to you that in a case like this the plaintiff, who brings the law suit, has the burden of proving negligence.

In determining the credibility of the witnesses, I said, “A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and being convinced that a witness has stated what is untrue, not as the result of mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of his testimony—” that is, the testimony of that particular witness— “with distrust and suspicion, and reject it all unless you shall be convinced notwithstanding the base character of the witness, that he has in order particulars sworn to the truth.”

That is all I said.

I did not mean to say that you can reject all the testimony in the case. If you got that impression then you have misinterpreted the court’s instruction, because a juror cannot reject all the testimony offered by both sides, and just sit still, because then you are not in a position to render a [439] verdict. That is why you are instructed as to the burden of proof, so that you will see that if matters are evenly balanced, then you have to decide the case according to the preponderance of the evidence, and I explained what is meant by preponderance of the evidence.

A Juror: That is all I wanted to know, your Honor.

The Court: Are there any other jurors who would like to ask any questions?

(No response.)

The Court: Do counsel desire to add to anything I have said?

Mr. Callaway: I would think only that the court might tell the jury they are not permitted to guess or speculate or surmise, but the verdict must be based on the evidence introduced here.

The Court: That is covered in the instructions. I said in the first part of the instructions, "You are the sole judges of the effect and value of the evidence. Your power, however, of judging of this effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence." And then I went on to say that you do not have to decide in conformity with the number of witnesses against a lesser number, if the lesser number carries conviction to you. Mr. Olson?

Mr. Olson: I might, in view of the court's remarks [440] regarding burden of proof, state that perhaps another reading of the *res ipsa loquitur* instruction on that burden might help the jury.

The Court: They have the entire instructions. I am merely trying to amplify them. The instructions can be taken back to the jury room with the jury. What I read is right in the printed instructions as I have given them to the jury.

I read verbatim from these instructions. Bear in mind these are the court's instructions. In other words, as I told you before, while counsel have the right, and, in fact, it is their duty to inform me on a subject on which they want instructions given, these instructions are taken and rewritten by the court. The instructions as given are not the instructions submitted by the plaintiff or submitted by the defendant. They are the instructions given by the court. They are even rewritten on government paper, so that they are my instructions. You are not to speculate as to where these instructions came from. They are the law as I expressed it to you. If I am in error, then the higher court corrects me.

If you want that portion read, I will read that portion. I will read the portion as follows:

“There is in our law a doctrine applying to negligence cases which is commonly known as the doctrine of ‘*res ipsa* [441] *loquitur*’. Literally translated from the Latin, this means ‘the thing speaks for itself.’

“That doctrine means that if a subject matter is shown by the evidence to have been manufactured and supplied for a particular use, and an injury to some person results from such usage, which would not have occurred in the ordinary course of things, if ordinary and proper care had been used in its manufacture, the thing or subject matter speaks for itself, and the law raises the presumption that the manufacturer did not use ordinary and proper care in its production. The burden would then be on

the manufacturer to substantially prove that ordinary and proper care was used in the manufacturing and supplying of such subject matter.

“However, the manufacturer is not responsible for defects that cannot be found by a reasonable, practicable inspection.”

Along with that instruction I will read the instruction as to reasonable care in making the inspections and tests during the course of manufacture which the manufacturer should recognize:

“You are further instructed that reasonable care under this instruction consists of making inspections and tests during the course of manufacture, and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article.”

And further, “Therefore, if you find that the defendant [442] properly made inspections reasonably designed to find defects which would render the panel raiser head unsafe for cutting and trimming wood, you must find that those inspections were reasonable.”

There are many more on both sides. I am not going to take the time to read them. Mr. Olson suggested I read that, and I read both instructions that set forth that question.

Are there any other questions?

A Juror: Your Honor, as I understand your instructions to read, if a juror has found that one witness' evidence does not set right with him, has he a right to set it aside or part of it aside?

The Court: What I meant to say is this: If his testimony does not appeal to you, then one of two situations may arise. If that testimony is proven by other witnesses, then you can follow those witnesses. If that testimony is contradicted by some other witness, you can believe that other witness.

In any event, in a case like this, where there is testimony on one side over the other, you have to believe one side or the other.

Mr. Caldwell: Thank you, your Honor.

The Court: Is there anything further?

Mr. Olson: No. I have nothing further. [443]

The Court: We have worked long hours. I am as interested as you gentlemen are to see this jury arrive at a verdict. If there is any doubt in the mind of a juror about anything I want to try to be helpful. I realize the jurors are new, and I am trying as best I can, without violating the proprieties here, to be helpful.

Mr. Olson: You read the instruction regarding reasonable care. I think, to follow that up, I would like the instruction regarding the degree of reasonable care necessary, according to the product——

The Court: All right. I will read that.

Mr. Olson: I would like that.

The Court: “You are instructed that the degree of care necessary to be exercised by a manufacturer in the production of a product varies with the danger to be expected from the product, and you are further instructed that the kind of inspection called for on the part of the manufacturer varies with the nature and danger of the thing inspected.”

If the jury desires to go to dinner and come back and deliberate further, we will all go to dinner and come back later and give the jury more time.

I have no desire to force you to decide this case sooner than you are ready. However, I want you to know that if the foreman had answered for you and I, upon inquiry, had found out that you had not changed your views and there was [444] no use to confer any further, I would have discharged you. Evidently you have changed your view as to what the situation was earlier, when I suggested that you work some more. The foreman has indicated that he believes that further discussion may result in a verdict.

Are you all of the same view at the present time?

A Juror: We are all, but possibly one.

The Court: If a majority feel that a verdict is still possible, then I will have you retire to the jury room and you can indicate to the clerk whether you want to be left alone for some time or you want to go to dinner and deliberate further.

You will withdraw to the jury room and then you can indicate to me in the next 15 minutes whether you want to go on and attempt to arrive at a verdict or if you desire to go to dinner.

I will return the instructions to the bailiff, for your benefit.

(Short recess taken.)

The Court: Gentlemen, I have another message from the jury. It is now 6:25. They say they want to go to dinner. Then they say that they would like

to have read to them "those portions of Mr. Meissner's deposition relating to the effect or defect in the casting to be found in the concluding portion of his testimony." [445]

Do you want me to look that up?

Mr. Olson: I think I can find it real quickly.

Mr. Callaway: I think the reporter ought to read it from her notes. I don't know what part of the deposition was read.

The Court: I do not care which procedure is followed. I think Mrs. Pickering can locate it and the portions of the deposition, and then we can call them back and have it read, and after it has been read we can ask them if there is any other portion they desire read.

Mr. Olson: Will you read me the note again, please?

The Court: "Those portions of Mr. Meissner's deposition relating to the effect or defect in the casting to be found in the concluding portion of his testimony."

Mr. Olson: Is your Honor intending to let them eat first before we do that?

The Court: Yes. Off the record.

(Discussion off the record.)

The Court: On the record.

All right, gentlemen. We will stand at recess until we hear from the jury further.

(Thereupon, at 6:30 o'clock, p.m., a recess was taken until 9:25 o'clock, p.m., of the same day.) [446]

Monday, February 20, 1950

The Court: Let the record show the jury have returned.

Ladies and gentlemen of the jury, your foreman sent word that you wanted to have read to you certain portions of Mr. Meissner's deposition, especially toward the end of the deposition, where it deals with the manner of discovering flaws. I do not have the wording of the request before me.

Mr. Olson: I might help you.

The Court: All right.

Mr. Olson: I took down the exact words.

The Court: "Those portions of Mr. Meissner's deposition relating to the effect or defect in the casting to be found in the concluding portion of his testimony."

While we were at dinner I had the reporter go through the deposition and her notes, and she will read to you the portions that we have identified as covering the particular topic. If, after they have been read, there are other portions that you want to refer to, we will try to locate them.

The Reporter (Reading):

"Q. Do you know what inclusion in a casting is, or porosity?

"A. Porosity, are you talking about density now, when you say porosity? [447]

"Q. Well, I don't know, to be honest with you.

"A. I couldn't know, no.

"Q. (By Mr. Johnston): Now, blow-holes, gas holes, and air holes all have the same effect on the

metal; is that correct? A. They would.

“Q. They are all substantially the same?

“A. Yes, they are all the same.

“Q. Now, if you found blow-holes in any of these castings, did you use the casting, or discard it?

“A. That was immediately discarded.

“Q. And there were some of them in this particular batch which were discarded because of blow-holes; is that correct? A. There was none.

“Q. None of them? A. No.

“Q. Blow-holes are structural defects in steel of this type, are they not?

“A. A blow-hole is a structural defect in any steel.

“Q. (By Mr. Johnston): And a blow-hole in steel of this type, if large enough, will be a very dangerous [448] condition is that not true?

“A. No, I wouldn't say it would be a dangerous condition.

“Q. No matter how large they are?

“A. No matter how large they are.

“Q. Or how small? A. Or how small.

“Q. Or how many there are, or how few there are? A. No.

“Q. They are still not a dangerous condition?

“A. They are still not dangerous; does he say——

“Q. And they don't constitute a dangerous or structural defect in the steel? A. No.

“Q. You are sure of that?

“A. Not in this particular instance.

“Q. Now, wouldn’t the blow-holes, if they were either large or if there were a number of them,—wouldn’t they reduce the strength of the steel?

“A. It would weaken it, but it would not weaken it to the point where it would be dangerous. [449]

“Q. (By Mr. Johnston): That is your answer?

“A. That is my answer.

“Q. You are sure of that?

“A. I am sure of that.

“Q. Under no circumstances could a blow-hole weaken the steel to the point where it would constitute a dangerous structural defect?

“Q. (By Mr. Johnston): You have seen many blow-holes in steel, haven’t you?

“A. I have never seen one in a panel raiser head.

“Q. (By Mr. Johnston): You have seen blow-holes in the steel, in other metals?

“A. I have seen it in cast iron, not cast steel.

“Q. Never seen it in steel?

“A. Never seen it in steel.

“Q. Under no circumstances could a blow-hole weaken a steel casting to the point where it would constitute a dangerous structural defect?

“A. No, it could not; not the way that was manufactured; it would be impossible.

“Q. Cast steel? A. That is right.

“Q. In making that answer you are depending on [450] your knowledge of the Gunité Foundries, and the type of steel foundry, and on the castings they furnished; is that right?

“A. That is right.

“Q. Rather than on your own knowledge?

“A. I am depending on them, as well as my own knowledge; because I know them to be a good manufacturer of these steel castings, good clean castings.

“Q. And you know of your own knowledge that blow-holes could not constitute a structural dangerous condition on steel castings of this type?

“A. That is right; they could not.

“Q. Now, blow-holes can be ascertained by magnafluxing or taking X-rays; is that correct?

“A. A magnaflux is a test for crack.

“Q. Would it not also show up blow-holes, if they were to the surface?

“A. If they were to the surface, yes.

“Q. And X-rays would show up blow-holes and cracks, both, would it not?

“A. That is right. I am just basing my knowledge on what I know of X-raying steel.

“Mr. Hubbard: You don't have any experience with that? [451]

“The Witness: No, I don't.

“Q. (By Mr. Johnston): But you never used, in connection with your company here, the defendant, either of those tests, magnaflux or X-ray?

“A. Not magnaflux; we discussed X-rays more already.

“Q. Did you ever use X-rays?

“A. I don't know how to use an X-ray machine.

“Q. Did your company, as a matter of practice, during the time you got these castings in and had

them in your storage bin, ever have them X-rayed, aside from this one time trying to determine whatever you mentioned here a while ago, the date of which—— A. I don't know the date.

“Q. Was the particular casting from which this particular panel raiser head in question was manufactured, was that casting ever X-rayed, to your knowledge, by anybody in connection with your company, or for your company; yes or no?

“This particular one?

“Q. Yes. A. No, it was not X-rayed.

“Q. Was it tested in any other way for blow-holes, [452] or anything else of that kind?

“A. It was inspected and checked for blow-holes during the operations.

“Q. Was any test made with magnesium—was any test made for magnesium, phosphorus or sulphur content in that particular casting?

“Q. (By Mr. Johnston): You have no knowledge of the tests that were made at the foundry at all, do you? A. No.

“Q. Well, were any tests made by or for your company which would determine what the composition of the casting in question was, prior to the time you made it up?

“The Witness: When I placed this order I order cast steel.

“Q. (By Mr. Johnston): Yes; did your company make any test of the composition of that casting, after you got it,—the composition of the casting? A. After we got it?

“Q. After you got it? A. No.

“Q. At any time before the head was delivered, were any tests made of the composition of the casting? A. Not to my knowledge. [453]

“Q. (By Mr. Johnston): If there had been any such tests, you would have known about them, would you? A. Yes, I would say so.

“Q. (By Mr. Johnston): It was not the standard practice, though, to make any tests?

“A. No. I might add, it was not necessary, out of cast steel.

“Q. (By Mr. Johnston): Was an open hearth or electric furnace used in casting the steel; do you know which one was used?

“A. That I cannot say, how that metal was prepared.

“Q. Don't you know that the electric furnace method is far superior?

“A. I am no foundry man, as well as metallurgist.

“Mr. Johnston: Then your answer is, you don't know, all right.

“Q. What was the method of casting employed; were steel molds or centrifugal casts used?

“A. I cannot say what their methods of casting it are.

“Q. You don't know if centrifugal casts were used the segregation in the metal would be [454] less; you don't know that?

“A. I could not say.

“Q. If there are a number of small blow-holes

in any steel casting of the type we have mentioned here, it will weaken the strength of the steel; is that not a fact?

“Mr. Johnston: Let me add something to that: As contrasted to any other casting of the same type, size, shape, and all have the same components, in which there are no blow-holes; that is, as between the casting with blow-holes and the casting without blow-holes, the one with blow-holes is the weaker; is that true?

“A. That is true; but when you are talking about blow-holes I would like to talk about blow-holes in this head.

“Q. (By Mr. Johnston): We are not concerned with blow-holes in this head.

“A. It is bound to be weaker.

“Q. (By Mr. Johnston): Will you tell us, please, whether an excess of magnesium, phosphorus, or sulphur, could cause the head to break?

“A. No.

“Q. (By Mr. Johnston): Now, do you know the operating revolutions per minute, what would be normal for the use of this head? [455]

“A. What would be normal safety r.p.m. would be about——

“Q. By r.p.m. you mean revolutions per minute?

“A. Yes; say from 3200 to 7200 would be safe normal operating speed.

“Q. And you might possibly even go to 10,000 on soft pine lumber, is that right,—safely?

“A. Oh, yes; there is a safety margin that it would sustain beyond that 7200, yes.

“Q. Up to 10,000 r.p.m.?

“A. You could operate it; I cannot say you could operate it as safely as on 7200.

“Q. But without nails, knots, or gravel, you could operate up to 7200?

“A. You could operate; but I would not say operate it safely.

“Q. What would be the safe limits?

“A. 7200, top limit.

“Q. That is the maximum?

“A. That is the approximate recommended maximum speed; different shapers run different speed.

“Q. The recommended speed of 7200, wasn't it; where was the maximum of safety? [456]

“A. There is a margin of safety way beyond that.

“Q. Yes, up to 10,000 r.p.m.?

“A. Yes, easily; but your safety is decreasing when you go up that high.

“Q. But still, in soft pine lumber, without knots or other obstructions in the line, up to 10,000 r.p.m. would be safe for normal operating, if the machine is in proper adjustment, and all that; is that right?

“A. Soft pine would not have anything to do with it; it is such a shear cutting there it would cut hard or soft.

“Q. Assume clear lumber, without obstructions, up to 10,000 would be safe?

“Mr. Hubbard: I object, because the question here does not contain all the elements necessary to answer the question. You would have to have several others.

“Mr. Johnston: He has already said 7200.

“Mr. Hubbard: He has told you that 3200 to 7200.

“Q. (By Mr. Johnston): 3200 to 7200 is the normal recommended range, is that right?

“A. About that, yes. [457]

“Q. What would the top maximum before an operation would become unsafe because of the speed?

“A. I wouldn't know what the top would be; all I know is what is safe.

“Q. Well, would the top be anything over 7200?

“Mr. Hubbard: I object. It has been answered.

“A. The top is about 7200.

“Q. (By Mr. Johnston): Give me a figure,—a thousand over, five hundred over?

“A. You could probably run beyond 20,000; I am not saying it would be safe.

“Q. I am talking about the top operating maximum.

“A. I am saying 7200, maybe 7500 will be safe; I am not saying anything over will be safe.

“Q. Now, in making these heads, you do know, do you not, that if the casting is defective that might constitute a danger to the workman operating the head?

“Mr. Hubbard: I object to that, because there is no showing here that there was a defective head.

“A. No, there is no danger.

“Q. (By Mr. Johnston): Even if the head is defective? [458]

“A. What do you mean by defective?

“Q. Well, let us assume that the head has a crack through it, a blow-hole through it, halfway through the arm, would that be dangerous to operate?

“A. That would not be dangerous under normal usage, no.

“Q. It would not? A. It would not.

“Q. You are sure of that, are you?

“A. I am sure of that, under normal usage.

“Q. Positive?

“A. Positive; because that cut is so light.

“Q. Assuming that the arm down here at the base, between where the arm joins onto the rest of the casting,—assume there were a blow-hole in there, and assume that that was maybe one-quarter inch long, and varied in width from, oh, two or three thousandths, up to maybe .040 or .050 of an inch, and so extended through the width for perhaps .010 or .015 of an inch, would that constitute a dangerous condition in the head, under normal usage?

“A. Assume he hits a spike?

“Q. No, under normal usage; forget all about spikes. [459]

“A. No, under normal usage that would not be a dangerous condition to operate that head.

“Q. You are sure of that?

“A. I am sure of that.

“Q. And assume it hit a spike or a knot or a nail, would it then constitute a dangerous condition?

“A. A knot, no; spikes, I couldn't answer. I

don't know how that spike is arranged in that wood; I don't know how the operator is speeding the lumber, or how fast; I couldn't answer.

“Q. Yes; now I am going to ask you to assume the following facts,—now, please bear in mind that this has nothing to do with your particular case, it is not your particular head, although it may sound that way; but if you will listen carefully, these are all assumed facts, simply for the purpose of the question; assume the following facts: That on or about October 28, 1948, in or near Los Angeles, California, a workman is using a new Champion panel raiser head with a $1\frac{1}{4}$ inch bore, right hand, designed and manufactured by your company for cutting lumber; that this panel raiser head has an upper and lower cutter, which has been properly installed [460] upon a double spindle shaper; this panel raiser head has had less than three hours use; it is operated up to that time without any difficulty, and in perfect normal and proper fashion; the workman or operator is using this panel raiser head upon new soft pine lumber containing no gravel, nails, or other hard objects; he is cutting the lumber, or shaping it to make a door; he is using ordinary and reasonable care for his own safety in such operation; now, if that panel head had been manufactured with ordinary and reasonable care, inspected with ordinary and reasonable care, installed with ordinary and reasonable care upon a double spindle shaper, and if the installation had been inspected and found proper, and if it had operated and been

found proper for over two hours prior to the time in question, and if at the time in question it was being operated with ordinary and reasonable care and without striking any hard object, such as a nail, stone, or other hard object in the wood, no breakage of or damage to the raiser head would result, would it?

“Q. (By Mr. Johnston): All right. Now, under those circumstances no breakage or damage to the head would result, would it? [461]

“A. Under normal usage, no.

“Q. Now a further question: Under those circumstances which I have detailed, the panel raiser head would not break and disintegrate, would it?

“A. No.

“Q. And the circumstances I have described are what you would term normal operation, are they not?

“A. If everything is right, and we know it to be right, and I should know it——

“Q. I am talking about the elements that I detailed; they are all what you would include in normal operation; if not, tell me.

“The Witness: A. I would say yes.

“Q. And under that kind of operation, under those circumstances, the head would not break, in normal usage?

“A. In normal use, no.

“Q. Or in use of the kind I have described, is that right?

“A. That is right.

“Q. What could cause breakage of the head under the conditions I have described; a weakening of the head by a blow-hole, if the blow-hole were [462] large enough, at the point down here in the base in the arm could cause it, couldn't it?

“A. Under normal usage, no; that head would break the first ten minutes, rather than wait two or three hours, like you say.

“Q. Now, you are sure of that?

“A. That is right; that would break right away.

“Q. You have made tests of defective heads to see when they would break, and found that they would break right away; is that it? What do you base your opinion on?

“A. Something happened in that head, in the meantime.

“Q. But what do you base your opinion on, that the head would break right away rather than after three hours usage?

“A. It is going just as fast in ten minutes as after three hours; I would say it would break immediately if it is going to break at all.

“Q. And structural defects in the steel could cause it to break, couldn't it?

“A. No, it could not, under normal uses, as you explained.

“Q. Under normal usage, structural defects [463] could never cause the head to break?

“A. Could not cause the head to break; that is made so substantially, out of cast steel; no.

“Q. You are positive of that?

“A. I am sure of that.

“Q. No matter what the condition or size of the blow-holes? A. That is right.

“Q. It doesn't make any difference?

“A. It wouldn't make any difference.”

“Q. In other words, if the blow-holes went half-way through the steel, it wouldn't make any difference?

“A. I have tried it this morning, and it didn't make any difference.

“Q. With blow-holes through it?

“A. With a hole drilled through it, larger than any blow-hole.

“Q. Now, at the time your company manufactured the particular head in issue here, you knew that it would be operated by a workman; isn't that right? A. Oh, yes.

“Q. And you also knew at that time that unless it was structurally sound that it might break [464] and injure somebody; is that true, unless it was structurally sound,—that it might break and injure somebody? A. It was structurally sound.

“Q. Answer my question: You knew at the time you made it that if it were not structurally sound it might break and injure somebody?

“A. What do you mean, not structurally sound?

“Q. What do you mean by structurally sound?

“A. Structurally sound is the way we make them, design it.

“Q. Then you knew unless the head was structurally sound it might break and injure somebody;

you know that is the case of every tool you make?

“A. They are structurally sound; they are inspected.

“Q. Let us forget this particular head, for the moment. You and I don’t see eye to eye, because you think I am trying to do one thing, when I am trying to do another.

“Q. (By Mr. Johnston): In the case of any tool that your company makes, if it is not structurally sound, if it is not propely made, it may be unsafe for the person who uses it;—you know that, don’t you?

“The Witness: A. If it is not structurally [465] sound, yes.

“Q. (By Mr. Johnston): And if this particular head had turned out not to be structurally sound, it might injure somebody; isn’t that true?

“A. No, not the way it is designed.”

The Court: Ladies and gentlemen of the jury, we had gone over and marked these pages and checked them against the notes of the reporter, and so far as we can all tell those portions read by the reporter are the evidence that bears upon that particular subject.

Was there any other portion that you wanted read, or are you ready to retire and discuss the matter further, in the light of what has been read?

Mr. Caldwell: Your Honor, with your permission the jury feels they would like the reporter to read a little further than she did. The point they wanted brought out we were just about up to. Toward the conclusion of the deposition.

A Juror: I hope I can make it so it won't sound improper. What I would like to ask is could or should any member of this jury who has some knowledge of the use of machines draw any conclusions from that?

The Court: No, no juror should bring into this case any of his own knowledge about machinery, or anything of that sort.

The Juror: We should go on the evidence produced here? [466]

The Court: The only evidence that can be produced as to the condition of the machine is the evidence in the record and the inference that you can draw from it. If a man has mechanical knowledge or mechanical skill or has operated this machine, he has no right to tell the other jurors about it. He is not under oath as a witness. He is a juror, not a witness.

A Juror: But, your Honor, I brought the question up before, if your Honor pleases, that a juror has the right to doubt a witness' veracity in his statements.

The Court: That is true. You have a right to disbelieve the testimony of a witness. But you have no right, in doing so, to substitute anything you know in order to impeach his testimony.

The Juror: The only thing I have said——

The Court: I do not want to hear anything you have said. You cannot disclose anything you may have on your mind. We are asking general questions.

If you do not believe the testimony of a witness, then you need not accept it. But that disbelief must arise, not by pitting your knowledge against what he testified to, but something which makes his testimony improbable because it is contradicted or goes contrary to ordinary experience.

If a witness should say, "At the present time this is a dark room," you would not have to take his word for it, even [467] if he were under oath. Do you understand?

The Juror: Yes.

The Court: But if a witness testifies that a certain piece of machinery was in a certain condition when it left the factory, you have no right to say, unless he is contradicted by another witness, it was not in that condition.

I will put it this way: You have no right to say it is not in that condition, unless the testimony in the record contradicts it, or unless it be an object which is before you and you can, by examining it, say it was in that condition. In other words, a juror is not required to take the testimony of a witness which, by physical facts in front of the juror is shown not to be correct. He has no right to substitute the knowledge he may have generally as to machinery for what a witness testifies.

Gentlemen, if you have no objection, we might as well——

Mr. Olson: I have no objection to the whole deposition.

The Court: ——have the jury take the original

deposition, which is not marked up except that I have indicated by clips the portions that were read.

Ladies and gentlemen of the jury, remember if you read the deposition over to eliminate the arguments of counsel and the discussions of counsel. Sometimes you may have to skip a whole page in order to find an answer to a question.

Mr. Callaway: I have no objection. [468]

The Court: All right. Mr. Caldwell, you take the deposition along, if it will help the jury. It contains the deposition of Mr. Knourek, also. If it will help you in your discussion in the matter, go ahead and use it.

Let the record show the jury have retired again to resume their deliberations.

(Thereupon, at 10:05 o'clock p.m., Monday, February 20, 1950, a recess was taken until 1:45 o'clock a.m. of Tuesday, February 21, 1950.)

Los Angeles, California, Tuesday, February 21, 1950
1:45 a.m.

The Court: Let the record show the jury have returned.

Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have.

The Court: Will you hand the verdict to the bailiff.

The clerk will read the verdict.

The Clerk: (Reading)

“United States District Court, Southern
District of California, Central Division

“No. 9134-Y Civil

“WILLIAM J. BYRNE,

“Plaintiff,

“vs.

“WOODWORKERS TOOL WORKS, a Corpora-
tion,

“Defendant.

“VERDICT

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff’s special damages at Eight Thousand Dollars, and fix plaintiff’s general damages at One Thousand Dollars.

“Dated: February 21st, 1950.

“GEO. F. CALDWELL,

“Foreman of the Jury.”

The Court: Do you desire the jury polled?

Mr. Lopardo: Yes.

The Court: Poll the jury.

As your names are called, please answer the question propounded to you.

The Clerk: Israel H. Marcus, is this your verdict as presented and read?

Mr. Marcus: Yes.

The Clerk: Iva M. Shaheen, is this your verdict as presented and read?

Mrs. Shaheen: Yes.

The Clerk: Mario C. Negri, is this your verdict as presented and read?

Mr. Negri: Yes.

The Clerk: Muriel M. Treulich, is this your verdict as presented and read?

Mrs. Treulich: Yes.

The Clerk: Owen K. Umstead, is this your verdict as presented and read?

Mr. Umstead: Yes.

The Clerk: Homer B. Terrill, is this your verdict as presented and read?

Mr. Terrill: Yes.

The Clerk: Maude S. Pande, is this your verdict as presented and read? [471]

Mrs. Pande: Yes.

The Clerk: Mary A. Walsh, is this your verdict as presented and read?

Mrs. Walsh: Yes.

The Clerk: Louise D. LeVine, is this your verdict as presented and read?

The Clerk: Geraldine Gale, is this your verdict as presented and read?

Mrs. Gale: Yes.

The Clerk: Jane A. Babcock, is this your verdict as presented and read?

Mrs. Babcock: Yes.

The Clerk: George T. Caldwell, is this your verdict as presented and read?

Mr. Caldwell: Yes.

The Court: The clerk will enter and record the verdict.

Ladies and gentlemen of the jury, I desire to thank you for your services in this matter. I regret the case kept you out so long. However, as I stated to you earlier in the evening, if you had informed me before you went to dinner that there was no possibility of a verdict I would have discharged you. I did not want to discharge you when I received the first message in the afternoon. I felt there was still a possibility of a verdict. You knew at all times [472] all you had to do was state to the court you had reached an impasse and the court would have discharged you. You chose to remain and work the matter out. I want to thank you for your efforts in this matter.

You will be excused until further notice.

The Court will stand adjourned. Stay of execution will be granted for a period of 10 days, until such motions as are necessary have been made. Counsel will give notice and then we will fix the time for the ruling. I will fix time for any argument and ruling on the reserved motion for the same time.

Mr. Lopardo: How many days do we have to give?

The Court: The same as for the motion for a new trial. There is no limit as to my power. I merely set it for the same date. Your notice must be given, and afterwards there is no time limit.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of April A.D., 1950.

/s/ VIRGINIA K. PICKERING,
Official Reporter.

[Endorsed]: Filed April 19, 1950.

United States District Court, Southern District of
California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS,

Defendant.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Califor-

nia, do hereby certify that the foregoing pages numbered from 1 to 116, inclusive, contain the original Amended Complaint for Personal Injuries; Summons and Return of Service; Notice of Motion to Dismiss Action and Quash the Return of Service of Summons; Affidavits of E. H. Preuer, Robert E. Dunne, Ray Taylor and William R. Walker; Second Amended Complaint for Personal Injuries; Answer to Second Amended Complaint; Motion to Dismiss First Count or Cause of Action of Second Amended Complaint and for a More Definite Statement; Notice of Motion; Decision on Motions; Stipulation re Deposition; Requested Jury Instructions Refused by the Court; Verdict; Judgment on Verdict; Notice of Entry of Judgment; Motion for Judgment non obstante veredicto and for New Trial; Motion to Amend Verdict and Affidavit of George F. Caldwell; Amended Judgment on Verdict Notice of Entry of Amended Judgment; Supersedeas Bond; Notice of Appeal and Designation of Record on Appeal and full, true and correct copies of Minute Orders Entered March 21, 1949, and March 13, 1950, which, together with original plaintiff's exhibits 1, 2, 2-A to 2-D, inclusive, 3 to 9, inclusive, and original defendant's exhibits A to G, inclusive, and original reporter's transcripts of proceedings on March 21, 1949, February 16, 17 and 20, 1950, and March 13, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 15th day of May, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12548. United States Court of Appeals for the Ninth Circuit. Woodworkers Tool Works, a corporation, Appellant vs. William J. Byrne, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals,
Ninth Circuit

No. 12548

WOODWORKERS TOOL WORKS, a corporation,
Appellant,

vs.

WILLIAM J. BYRNE,

Appellee.

DESIGNATION OF RECORD

Comes Now the appellant Woodworkers Tool Works, a corporation, and designates its record on appeal as follows:

1. The entire Clerk's Transcript as certified in the lower court.

2. All of the Reporter's Transcripts consisting of three volumes dated on the front cover thereof as follows: February 16, 1950, February 17, 1950, and February 20, 1950, respectively.

3. The following documentary exhibits introduced by the plaintiff—Exhibits number 3, 6, 7, 8 and 9.

4. The following documentary exhibits introduced by the defendant—Exhibits "A," "C," and "D."

No depositions, whether or not designated as exhibits are to be printed for the reason that the material portions of all depositions were read into

the record and are a part of the Reporter's Transcript.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 23, 1950.

[Title of Court of Appeals and Cause.]

MOTION TO CONSIDER EXHIBITS IN
ORIGINAL FORM

Comes Now Woodworkers Tool Works and moves the above-entitled court for permission to have the following enumerated exhibits considered in their original form without the necessity of having photographs there of included in the record:

Plaintiff's exhibits 1, 2, 2-A, 2-C, 2-D, 4 & 5, 3, 6, 7, 8 and 9.

Defendant's exhibits "B," "E" & "F," "C" and "D."

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

It Is So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge, United States
Court of Appeals.

/s/ WILLIAM HEALY,
Judge, United States Court
of Appeals.

WM. E. ORR,
Judge, United States Court
of Appeals.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 15, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant Woodworkers Tool Works, a corporation, and states the points on which it intends to rely on appeal as follows:

1. It was error for the trial court to deny appellant's motion to dismiss action and quash the return of service of summons, for the reason that there never was any service of process upon Woodworkers Tool Works or any of its agents.

2. The verdict of the jury was contrary to law in that the special damages awarded to appellee were in excess of those pleaded or proven.

3. There was no evidence of negligence on the part of appellant.

4. There was no evidence showing, or tending to show, a causal connection between the breaking of the Champion Panel Raiser Head and the injury of the appellee.

5. It was error for the trial court to instruct the jury that the doctrine of *Res Ipsa Loquitur* was applicable.

6. It was error for the trial court to permit the Foreman of the Jury to impeach the verdict of the jury.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 23, 1950.